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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 159

MALCOLM DOUGLAS AND BERT C. ROSS, PROSECUTING ATTORNEY AND DEPUTY PROSECUTING ATTORNEY FOR KING COUNTY, APPELLANTS,

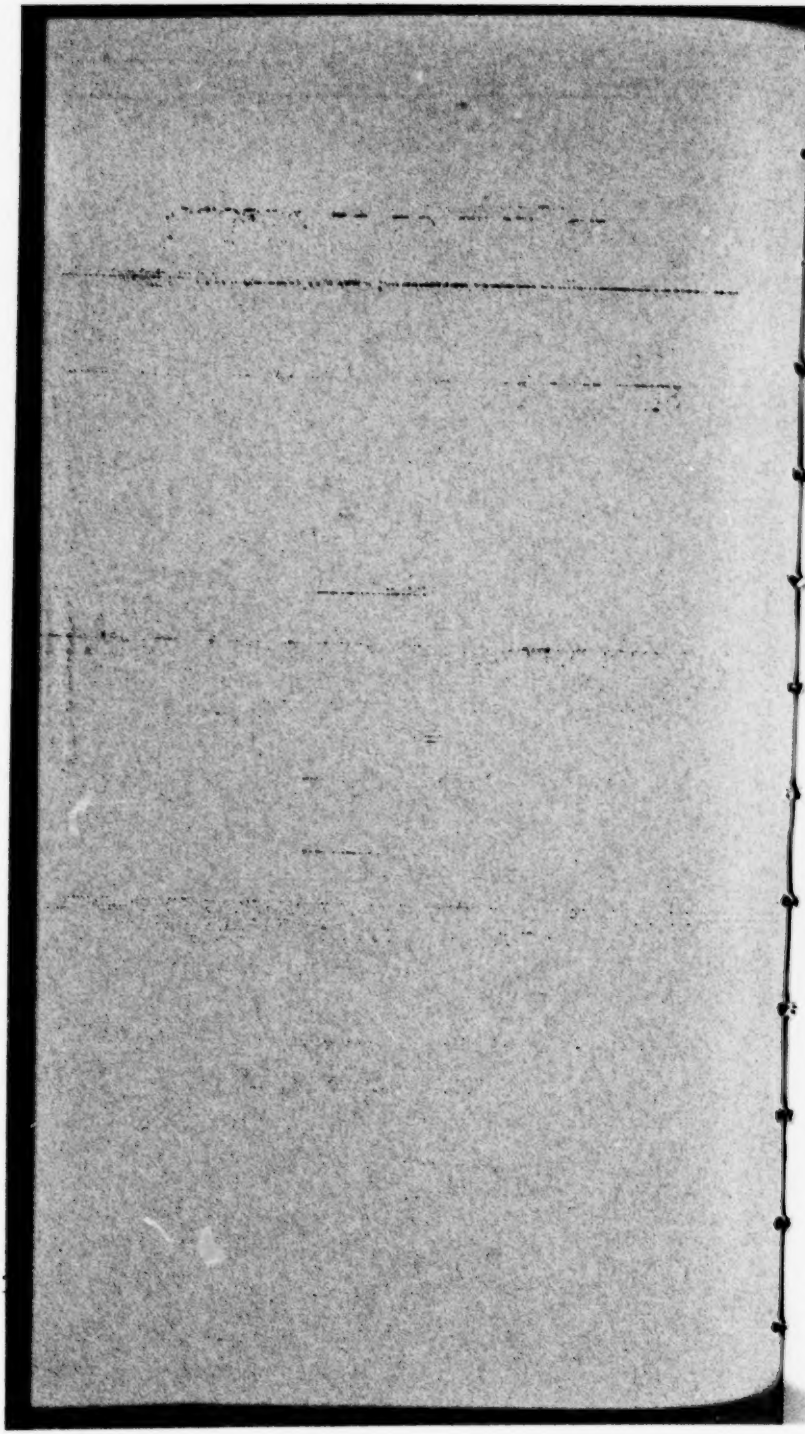
vs.

LEON NOBLE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

FILED AUGUST 31, 1921.

(28,453)



(28,453)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 498.

MALCOLM DOUGLAS AND BERT C. ROSS, PROSECUTING ATTORNEY AND DEPUTY PROSECUTING ATTORNEY FOR KING COUNTY, APPELLANTS,

vs.

LEON NOBLE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGON.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1921.

1 & 2 *Names and Addresses of Counsel.*

Malcolm Douglas, Esq., Prosecuting Attorney for King County, Washington, Solicitor for Appellants, 431 County-City Building, Seattle, Washington.

Bert C. Ross, Esq., Deputy Prosecuting Attorney for King County, Washington, Solicitor for Appellants, 431 County-City Building, Seattle, Washington.

J. W. A. Nichols, Esq., Solicitor for Appellee, 504-505 Provident Building, Tacoma, Washington.

Browder Brown, Esq., Solicitor for Appellee, 504-505 Provident Building, Tacoma, Washington.

3 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity.

No. 233.

LEON NOBLE, Complainant,

vs.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Leon Noble, the complainant above named, by his attorneys and solicitors Browder Brown and J. W. A. Nichols presents this his bill of complaint against the above named defendants and thereupon your orator complains and says:

That this complainant is a citizen of the United States and resident of the City of Seattle, County of King and State of Washington and has so resided in said City for the past 32 years.

That complainant is by profession and practice a dentist and skilled in the theory and practice of dentistry having pursued his duties in the science and practice of his said profession in a reputable and standard school and college of dentistry, to-wit, the North Pacific Dental College of Portland, Oregon, from which college after attendance and study and practice therein for the full term required and after examination by the faculty of said college the complainant was awarded and received the diploma of said college as evidence of his learning and skill in said profession and authorizing him to practice his said profession in all its branches as a graduate of said college from and after the date of said diploma, to-wit, May 21st, 1909.

4 And your orator further says that during the time since receipt of said diploma, the complainant has engaged in the practice of his said chosen profession in its various branches and in

the cleansing, care and repair of teeth and the manufacture and fitting and adjustment of artificial teeth.

That complainant is of the age of 38 years and has a family consisting of his wife and two children, a son of the age of seventeen years, and a daughter of the age of twelve years.

That since his graduation from said dental college, complainant has, by the practice of his profession, made a comfortable living for himself and his said family and has been enabled thereby to supply his family with the necessities and some of the comforts of life and to provide his said children with the advantages and education afforded by the common and high schools of the State, and that he has no other available means whatever of maintenance or support.

And your orator further complains and says that the defendant herein, Malcolm Douglas is the Prosecuting Attorney of King County, Washington, and the defendant Bert C. Ross is Deputy Prosecuting Attorney for said King County.

That on the 9th day of December, 1920, the defendant Bert C. Ross caused to be filed in the Superior Court of the State of Washington, an information charging the complainant herein with a crime against the laws of the State of Washington to-wit, with practicing dentistry in the City of Seattle in said State, without having a license so to practice from the State Board of Dental Examiners and by said information caused the arrest and imprisonment of complainant and said cause is now pending in the said Superior Court, complainant being at present released from custody on bail pending the hearing trial and judgment in said cause.

And further complaining, your orator says, that since his said arrest, imprisonment and release on bail, the complainant, under the advice of his counsel has continued in the practice of his profession and in order to maintain and support his family is compelled so to follow and practice his said profession, and without the aid and support derived from such practice, the complainant and his family will be wholly without means of support and will be wholly dependent upon the charity of friends or the public.

That the defendants have threatened to have complainant again arrested and imprisoned unless he desists from the practice of dentistry and to continue so to arrest and imprison him as often as he shall engage in such work and so to compel him to abandon his profession and thereby destroying the fruits of his college study and education and life work and leave him helpless in the discharge of his duties to his family and as a citizen.

And your orator further complains and says that the information and arrest of complainant aforesaid and of which defendants are threatening to repeat are brought under the pretended authority of the statutes of Washington, to-wit, Sections 8412 to 8425, both inclusive, of Remington's Code of said State of Washington, and particularly of Sections 8416, 8421 and 8425 thereof. And that said statute is repugnant to the Constitution of the United States and to the Fourteenth Amendment thereof, and that by enforcing

said statute, complainant is deprived of his liberty and of his property without due process of law.

And your orator further says that the aforesaid trial of complainant in the State Courts will require long periods of time in the presentation trial and determination of complainant's defense and that whether the judgment therein shall be favorable or adverse to complainant, the cause will proceed by appeal or writ of error to the Supreme Court of the United States, and that pending such procedure through long periods of time complainant will be prevented from practicing his profession unless by relief granted by this Court and will thereby suffer great and wholly irreparable loss.

6 That complainant has tried to comply with the requirements of said Board of Dental Examiners, and therein has taken three several examinations and paid each time the required fee of twenty-five dollars; but that said Board has each time arbitrarily refused to grant complainant a license, and so without assigning or giving any reason therefor, and without giving to complainant any record or information as to the result of his examination other than to inform him that he had not passed.

That by reason of the unlimited and arbitrary power granted to said Board by said statute and exercised by them thereunder and by the arrest and imprisonment of complainant by defendants pursuant thereto complainant is deprived of his liberty and property without due process of law.

Wherefore your orator prays that a subpœna issue herein to the defendants Malcolm Douglas and Bert C. Ross, prosecuting Attorney and Deputy Prosecuting Attorney, requiring them to answer herein, but not under oath, and that pending said answer, a restraining order issue herein enjoining and restraining said defendants and each of them, their deputies, assistants, and agents and successors from making or filing or causing or permitting to be made or filed any information against this complainant under said statutes or from interfering in any way with complainant in the practice of his said profession pending the final hearing on this bill of complaint; and that upon such final hearing, an injunction may be granted, perpetually enjoining and restraining said defendants and their agents, servants and assistants from enforcing or attempting to enforce said statutes against complainant. And complainant prays for such other, or further or different relief as to the Court shall seem meet and equitable herein.

BROWDER BROWN,
J. W. A. NICHOLS,
Attorneys and Solicitors for Complainant.

504-505 Provident Building, Tacoma, Washington.

7 Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 1, 1921. F. M. Harshberger, Clerk, By S. E. Leitch, Deputy.

8 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 233. Equity.

LEON NOBLE, Complainant,

vs.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney of King County, Washington, Defendants.

Order to Show Cause.

On motion of complainant by his counsel and upon reading and considering the bill of complaint and affidavit filed herein by complainant and it appearing therefore that a necessity exists for the issuance of a temporary restraining order as prayed in the bill of complaint, it is therefore now by the court

Ordered that the defendants herein, Malcolm Douglas and Bert C. Ross, as Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Washington, and their servants, assistants and agents be and they are hereby required to show cause before this court on Monday, February 7, 1921, at two o'clock P. M. why a restraining order pendente Lite should not be issued enjoining them from prosecuting the complaint under the State Statute known as the Dental Code, or interfering with complainant in his business, pending the trial or this cause, and that pending said hearing to show cause, said defendants be, and they are hereby restrained and enjoined from so prosecuting or interfering with complainant, and it is further ordered that a copy of this order be served forthwith on said defendants.

Dated this 1st day of Feb. 1921.

EDWARD E. CUSHMAN,
Judge.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 1, 1921. F. M. Harshberger, Clerk. S. E. Leitch, Deputy.

9 Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of Wash., ss:

I hereby certify and return that I served the annexed Order to Show Cause on the therein-named Malcolm Douglas and Bert C. Ross, Prosecuting Att'y and Deputy Prosecuting Att'y of King Co., Wash., by handing to and leaving a true and correct copy thereof with each

of them personally at Seattle, in said District, on the 1st day of Feby. A. D. 1921.

JOHN M. BOYLE,
U. S. Marshal,
By A. ROOKS,
Deputy.

Marshal's fees, $4.20.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 1, 1921. F. M. Harshberger, Clerk. S. E. Leitch, Deputy.

10 *Subpœna.*

UNITED STATES OF AMERICA:

In the United States District Court for the Western District of Washington.

In Equity.

No. 233.

The President of the United States of America to Malcolm Douglas and Bert C. Ross, Prosecuting Attorney and Deputy Prosecuting Attorney of King County, Greeting:

You are hereby commanded, That you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of Seattle on the 21st day of February, 1921, to answer a Bill of Complaint filed against you in said Court by Leon Noble and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of the law.

Witness the Honorable Edward E. Cushman, Judge of said Court, and the seal thereof, at Seattle, Washington, this 1st day of February, 1921.

[Seal U. S. District Court.]

F. M. HARSHBERGER,
Clerk,
By FRANK L. CROSBY, JR.,
Deputy Clerk.

Memorandum Pursuant to Rule 12, *Supreme Court, U. S.*

You are hereby required to enter your appearance in the above mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

F. M. HARSHBERGER,
Clerk.
By FRANK L. CROSBY, JR.,
Deputy Clerk.

11 *Marshal's Return.*

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify, That I have served the within writ by delivering to and leaving a true copy thereof with Malcolm Douglas and Bert C. Ross at Seattle, Wn.

JOHN M. BOYLE,
United States Marshal.
By A. ROOKS,
Deputy.

Feby. 1st, 1921.

Fees: 4.20.

Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 1, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

12 In the District Court of the United States for the Western District of Washington, Northern Division.

#233.

LEON NOBLE, Plaintiff,

vs.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Answer.

The Answer of Malcolm Douglas and Bert C. Ross, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, State of Washington, in the Above-entitled Cause to the Plaintiff's Bill of Complaint.

I.

For answer in lieu of demurrer to the plaintiff's bill, the defendants say that the plaintiff has not in or by his said bill made or stated such a cause as entitles him in a court of equity to any relief as to the matters contained in said bill, or any of such matters, and for special ground of demurrer these defendants say that §§ 8412 to 8425 both inclusive of Remington's Washington Code of the State of Washington, and particularly §§ 8416, 8421 and 8425 thereof are not repugnant to the Constitution of the United States, or to the Fourteenth Amendment thereof as alleged and set up in plaintiff's bill of complaint, and that an examination thereof by this Honorable Court will disclose that plaintiff's bill of complaint depends en-

tirely upon the question of the constitutionality or unconstitutionality of said sections of Remington's Code of the State of
13 Washington and that said sections are constitutional.

II.

And for further answer to the plaintiff's bill of complaint, these defendants say:

1. That they admit that the plaintiff is a graduate of a Dental College as alleged in said bill of complaint.

2. That they admit that plaintiff has engaged in the practice of dentistry since such graduation, but they allege such practice by the said plaintiff in King County, State of Washington, has at all times been unauthorized by the State of Washington, and in direct violation of §§ 8412 to 8425, both inclusive, of Remington's Code of the State of Washington.

3. That they admit plaintiff is 38 years of age, and has a family consisting of his wife and two children as alleged in his bill of complaint.

4. That they deny that plaintiff has no other available means whatever of maintenance or support than the practice of dentistry as alleged in his bill of complaint.

5. That they admit that Malcolm Douglas is the Prosecuting Attorney of King County, Washington, and that Bert C. Ross is a Deputy Prosecuting Attorney for said King County as alleged in said bill of complaint.

6. That they admit that the said Bert C. Ross, caused an information to be filed in the Superior Court of the State of Washington for King County, charging the plaintiff with the crime of practicing dentistry without a license as alleged in the said bill of complaint.

7. That they have no knowledge as to the advice given plaintiff by his counsel relative to his right to continue to practice dentistry and, therefore, they deny the allegation of the complaint
14 wherein it is alleged that he was so advised, and these defendants deny that it is necessary for plaintiff to continue such practice as alleged in said bill of complaint.

8. That they admit that it is their purpose to continue to prosecute this plaintiff, and all other persons whom it is shown to them are violating the provisions of the statute relative to the practice of dentistry.

9. That they admit that the said prosecution was brought under §§ 8412 to 8425, both inclusive, of Remington's Code of the State of Washington, but they deny that said sections and particularly §§ 8416, 8421 and 8425 thereof are repugnant to the Constitution of the United States, and the Fourteenth Amendment thereof, and they further deny that by enforcing said statute plaintiff is deprived of his liberty and property without due process of law.

10. That these defendants have no means of knowing to what extent plaintiff will proceed by appeal or otherwise in case of a conviction in the cause now pending against him in the Superior Court of the State of Washington for King County, or that the same will require long periods of time and they, therefore, deny said allegation of the bill of complaint and they also deny that plaintiff will suffer great and wholly irreparable loss if he is prevented from practicing dentistry in King County, State of Washington, as alleged in his said bill of complaint.

11. That they admit that plaintiff has tried to meet the requirements of the State Board of Dental Examiners of the State of Washington as alleged in the bill of complaint, but they deny that said board arbitrarily refused to grant him a license as alleged in the bill of complaint.

12. That they deny plaintiff is deprived of his liberty and property without due process of law by reason of unlimited and arbitrary powers granted the State Board of Dental Examiners by the statute hereinabove mentioned, and exercised by them thereunder, or by the arrest and imprisonment of plaintiff pursuant thereto as alleged in the bill of complaint.

Wherefore, these defendants pray that the temporary injunction heretofore granted in this action be dissolved, and that this bill be dismissed, and that these defendants recover their costs and disbursements in this action.

MALCOLM DOUGLAS,
BERT C. ROSS,
Attorneys for Defendant.

STATE OF WASHINGTON,
County of King, ss:

Malcolm Douglas, being first duly sworn on oath deposes and says: That he is one of the attorneys for the defendant above named; that he has read the foregoing answer, knows the contents thereof and believes same to be true.

MALCOLM DOUGLAS.

Subscribed and sworn to before me this 8th day of March, 1921.
CHESTER A. BATCHELOR,
Notary Public in and for the State of Washington, Residing at Seattle.

Due Service of the within Answer acknowledged and receipt of copy thereof admitted this 8 day of Mch., 1921.
BROWDER BROWN,
J. W. A. NICHOLS,
Attorneys for Plaintiff.

Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 8 1921. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

16 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 233.

LEON NOBLE, Complainant,

vs.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney, Defendants.

Order.

On request of defendants and consent of complainant, it is by the court ordered:

That the hearing on motion for restraining order pendente lite be continued until Feb. 21st, 1921, at 2 o'clock P. M. the present temporary restraining order to remain until such hearing. It appearing to the court and the court being of opinion that irreparable loss would result to the complainant unless such order is so continued and granted.

EDWARD E. CUSHMAN.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 7, 1921. F. M. Harshberger, Clerk, S. E. Leitch, Deputy.

17 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 233.

LEON NOBLE, Complainant,

vs.

MALCOLM DOUGLAS and BERT ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney, Defendants.

Order.

This matter coming on regularly for hearing on the order to show cause why a temporary injunction should not issue herein pending the trial and final determination of this cause, it is hereby

Ordered: That the temporary restraining order heretofore issued herein, be and the same is hereby continued to remain in effect until said final determination.

And the final hearing and trial of this cause having been set my the Court by agreement of counsel for the fourteenth day of March, 1921, at two o'clock p. m., it is further by the Court ordered: That

the plaintiff or his counsel cause to be served upon the Governor and the Attorney General of the state of Washington at least five days prior to said date of March 14th true copies of the bill of complaint and of this order; and that the defendants cause to be served upon the Governor and Attorney General true copies of their pleadings filed or to be filed herein, and served also upon plaintiff's counsel, all at least five days prior to said March 14th, 1921.

Feb. 21st, 1921.

EDWARD E. CUSHMAN,
Judge.

Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 21, 1921. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

18 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 233.

LEON NOBLE, Complainant,

v.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney, Defendants.

Stipulation.

It is hereby stipulated by and between the parties to this action, through their respective attorneys, that the issues herein will be joined and the case ready for trial on the 14th day of March, 1921.

Dated this 9th day of February, 1921.

BROWDER BROWN,
J. W. A. NICHOLS,
Attorney- for Complainant.
MALCOLM DOUGLAS,
BERT C. ROSS,
Attorneys for Defendants.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 9, 1921. F. M. Harshberger, Clerk, S. E. Leitch, Deputy.

19 In the District Court of the United States, Western District of Washington, Northern Division.

In Equity.

No. 233.

LEON NOBLE, Complainant,

vs.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Memorandum Decision on Application for a Temporary Injunction.

Filed, April 15, 1921.

Browder Brown, J. W. A. Nichols, for Complainant.
Malcolm Douglas, Bert C. Ross, for Defendants.

Before Hon. William B. Gilbert, U. S. Circuit Judge; Hon. Edward E. Cushman, Hon. Jeremiah Neterer, U. S. District Judges.

CUSHMAN, *D. J.*:

The bill avers:

"That complainant is by profession and practice a dentist and skilled in the theory and practice of dentistry having pursued his studies in the science and practice of his said profession in a reputable and standard school and college of dentistry, to-wit, the North Pacific Dental College of Portland, Oregon, from which college after attendance and study and practice therein for the full term required and after examination by the faculty of said college the complainant was awarded and received the diploma of said college as evidence of his learning and skill in said profession and authorizing him to practice his said profession in all its branches as
20 a graduate of said college from and after the date of said diploma, to-wit, May 21st, 1909.

"And your orator further says that during the time since receipt of said diploma, the complainant has engaged in the practice of his said chosen profession in its various branches and in the cleansing, care and repair of teeth and the manufacture and fitting and adjustment of artificial teeth.

"* * * and that he has no other available means whatever of maintenance or support."

It is further averred that the Prosecuting Attorney for King County, Washington, has filed an information in the Superior Court of that state, charging:

"the complainant herein with a crime against the laws of the state of Washington to-wit, with practicing dentistry in the City of Seattle in said State, without having a license so to practice from the State Board of Dental Examiners and by said information caused the arrest and imprisonment of complainant and said cause is now pending in the said Superior Court, complainant being at present released from custody on bail pending the hearing, trial and judgment in said cause.

"And further complaining, your orator says, that since his said arrest, imprisonment and release on bail, the complainant under the advise of his counsel has continued in the practice of his profession and in order to maintain and support his family is compelled so to follow and practice his said profession, and without the aid and support derived from such practice, the complainant and his family will be wholly without means of support and will be wholly dependent upon the charity of friends or the public.

"That the defendants have threatened to have complainant again ar-essted and imprisoned unless he desists from the practice of dentistry and to continue so to arrest and imprison him as often as he shall engage in such work and so compel him to abandon his profession and thereby destroying the fruits of his college study and education and life work and leave him helpless in the discharge of his duties to his family and as a citizen.

"And your orator further complains and says that the information and arrest of complainant aforesaid and of which defendants are threatening to repeat are brought under the pretended authority of the statutes of Washington, to-wit, Sections 8412 to 8425, both inclusive, of Remington's Code of said State of Washington, and particularly of Sections 8416, to 8421 and 8425 thereof. And that said statute is repugnant to the Constitution of the United States and to the Fourteenth Amendment thereof and that by enforcing said statute, complainant is deprived of his liberty and of his property without due process of law.

21 "And your orator further says that the aforesaid trial of complainant in the State Courts will require long periods of time in the presentation trial and determination of complainant's defense and that whether the judgment therein shall be favorable or adverse to complainant, the cause will proceed by appeal or writ of error to the Supreme Court of the United States, and that pending such procedure through long periods of time complainant will be prevented from practicing his profession unless by relief granted by this Court and will thereby suffer great and wholly irreparable loss.

"That complainant has tried to comply with the requirements of said Board of Dental Examiners, and therein has taken three several examinations and paid each time the required fee of twenty-five dollars; but that said Board has each time arbitrarily refused to grant complainant a license and so without assigning or giving any reason therefor, and without giving to complainant any record or information as to the result of his examination other than to inform him that he had not passed.

"That by reason of the unlimited and arbitrary power granted to said Board by said statute and exercised by them thereunder and by the arrest and imprisonment of complainant by defendants pursuant thereto, complainant is deprived of his liberty and property without due process of law."

Defendants have answered and, while denying complainant's conclusions, admit the material allegations of fact in the complaint and aver that:

"plaintiff's bill of complaint depends entirely upon the question of the constitutionality or unconstitutionality of said sections of Remington's Code of the State of Washington, and that said sections are constitutional."

The sections referred to being sections 8412 to 8425, inclusive, and particularly sections 8416, 8421 and 8425 of Remington & Ballinger's Code of the State of Washington.

The pertinent provisions of the chapter of the code regulating dentistry are as follows:

"Sec. 8412. A board of dental examiners, consisting of five practicing dentists, is hereby created, whose duty it shall be to carry out the purposes and enforce the provisions of this chapter."

Section 8413 provides that the members of the board shall be appointed by the Governor and regulates their terms of office and the portion of the state from which they shall be appointed.

22 Section 8414 gives a form of oath administered to the board.

Section 8415 provides:

"The board shall choose one of its members president and one secretary thereof, and it shall meet at least twice each year, in May and November, or oftener at the call of the president or secretary. * * *"

Section 8416 provides:

"Any person or persons seeking to practice dentistry in the state of Washington, or to (own), operate or cause to be operated, (or run or manage) a dental office or place for the practice of dentistry in the state of Washington after the passage of this act shall file his or her name, together with an application for examination, with the secretary of the state board of dental examiners, and at the time of making such application shall pay to the secretary of the board a fee of twenty-five dollars, and to present him or herself at the first regular meeting thereafter of said board to undergo examination before that body. No person shall be eligible for such examination unless he or she shall be of good moral character and shall present to said board his or her diploma from some dental college in good standing and shall give satisfactory evidence of his or her rightful possession of the same; Provided, this section shall not apply to persons engaged in the practice of dentistry at the time of the passage of this

act who are bona fide citizens of the state of Washington. All persons successfully passing such examination shall be registered as licensed dentists in the board register as hereinafter provided, and also receive a certificate, said certificate to be signed by the president and secretary of said board and in substantially the following form, to-wit:

"This is to certify * * * is hereby licensed to practice dentistry in the state of Washington. This certificate must be filed for record in the office of the auditor of any county in which the party holding such certificate desires to practice, and it is unlawful for him (or her) to practice dentistry in any county in which said certificate is not filed for record.

Dated at * * * this * * * day of * * *, A. D. 190–."

This section, as well as section 8421 and 8424, was held unconstitutional as to "owning, running or managing" a dental office in State v. Brown (37 Wash., 97).

Section 8417 defines the rights conferred by the certificate, and provides:

"* * * Any person failing to pass the first examination successfully may demand a second examination at a subsequent
23 meeting of said board, and no fee shall be charged *to* (for) said examination; Provided, that the second examination is taken before the expiration of one year."

Section 8418 requires admitted dentists to register with the board.

Section 8419 provides persons practicing dentistry shall display, conspicuously, the names of all employees.

Section 8420 provides for the recording of the certificates issued by the board with the County Auditor.

Section 8421 provides:

"Any person who, as principal, agent, employer, employee or assistant, *who* in any manner whatsoever shall practice dentistry or who shall (own, run) operate or cause to be operated, (or manage) a dental office or headquarters in the state of Washington without having first filed for record and had recorded in the office of the auditor of the county wherein he shall so practice or do such act, a certificate from said board of dental examiners as herein provided, shall be deemed guilty of misdemeanor, and upon conviction shall be fined in any sum not less than fifty dollars, nor more than two hundred dollars, or be confined for any period not exceeding six months in the county jail for each and every offense: Provided, the foregoing provisions of this section shall not, prior to the tenth day of July, 1901, apply to any person who shall be practicing dentistry in this state at the time of the passage of this act and whose name shall be registered under the provisions of this act in the records of said board. After said tenth day of July, 1901, all the provisions of this section shall apply to all persons whomsoever. All fines recovered under

this act shall be paid into the common school fund of the county in which the conviction is had."

Section 8422 makes the Auditor's certificate of no record of the board's certificate, prima facie evidence against an accused for want of authority to practice dentistry.

Section 8423 regulates the handling of fees charged for examinations, the compensation of the members of the board and related matters.

24 Section 8424 provides:

"All persons shall be said to be practicing dentistry within the meaning of this chapter who shall contrary to this act for a fee or salary or other reward paid either to himself or to another person for operations or parts of operations of any kind, treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof, (or who shall own, run or manage a dental office or department) in the state of Washington, without registering and procuring the licenses as herein provided."

Section 8425 charges the prosecuting attorney with duty of attending to prosecutions under the act.

No claim is made that the practice of dentistry is not a proper subject for legislative regulation under the police power of the state, in the interest of public health. The complaint is that there has been no legislative regulation of the practice of dentistry, but merely an attempt on the part of the Legislature to delegate to the Board of Dental Examiners the regulation of the practice of dentistry.

In State ex rel. Smith v. Dental Examiners (31 Wash., 492), this law was attacked under the state constitution upon other grounds and upheld. The petitioner in that case did not hold a diploma from a dental college. The Supreme Court, by upholding the validity of the statute in that decision, held the requirement of a diploma from such a college a reasonable exercise of the police power. To the same effect was the unreported decision of Judge Neterer (filed September 23, 1915) in In re Francis Stephen Mederaf, which was affirmed in Mederaf vs. Hodge 245 U. S., 630.

The issue at bar, concisely stated, is the inoperative effect of the provision of the dental act requiring the holder of a diploma to present himself at a meeting of the dental board "to undergo examination before that body."

In re Thompson (36 Wash., 377), the validity of this law was again before the Supreme Court of this State. In disposing of the question and upholding the constitutionality of the law, the court held:

25 "* * * No power of legislation is conferred by the act upon the dental board, unless it may be said that the rules which the board have adopted, or may adopt, are arbitrary and unauthorized. There is nothing in the record before us to indicate that the dental board have adopted any rules, arbitrary, or otherwise, but

assuming that the board have adopted some rules—as they certainly must, in order to properly determine the good character of the applicant and the good standing of the college issuing his diploma, and to conduct the examinations upon subjects reasonably required in that profession—we must assume in this proceeding that such rules are reasonable and within the scope and purview of the act. That the board may adopt unreasonable, unwarranted, or purely arbitrary rules for the examination of applicants cannot be presumed to defeat the act. Unless the act itself is void, arbitrary or void rules, made without authority of the act, cannot render it so. The remedy of petitioner for an abuse of the powers of the dental board is not an attack upon the act creating the board, but must be found in some appropriate proceeding to review the conduct of the board" (at p. 379).

The Court in so deciding, based its ruling entirely upon Ex parte Whitely (77 Pac., 879; 144 Cal., 167), which decision, in turn was decided upon authority of Dent v. West Virginia (129 U. S., 124).

The Washington court, in the above decision, recognizes that there must be some rules to

"properly * * * conduct the examinations upon subjects reasonably required in that profession."

The court evidently assumed that the board had adopted such rules and that they were reasonable rules, and, inferentially, that they had followed such rules; and further that they could be depended upon to continue to do so. This appears to us to be a non sequitur.

The court made the further deduction that no legislative power was conferred by the act,

"unless it may be said that the rules which the board have adopted, or may adopt, are arbitrary and unauthorized."

Other than is shown above, the court does not discuss and dispose of the question of whether or not the terms of the statute purported to clothe the board with power under which it "may adopt" arbitrary rules.

The question of whether arbitrary power is included in the terms of a statute is not to be determined by ascertaining whether arbitrary actions has been had under it, else we would be compelled to conclude in one case that arbitrary power had been conferred by a statute because arbitrary action was taken under it, and in another that arbitrary power had not been conferred by a statute because, forsooth, in the particular case considered, there had been no arbitrary action under it.

The power would be conferred to make rules, if at all, whether the rules were good or bad. If the rules were bad, it would be an abuse by the board of the power conferred and not want of power to make rules.

In the Dent case (supra), the West Virginia statute did not re-

quire—as the Washington statute does—that the applicant
26 for license to practice should have a diploma from a dental college in good standing and be examined, in addition thereto, by the board, but required that the applicant for license to practice should have practiced medicine in the state continuously for ten years or be a graduate of a reputable medical college, or be examined by the board; and

"if upon full examination they find him qualified to practice medicine in all its departments, they, or a majority of them shall grant him a certificate to that effect."

The petitioner in the Dent case was not a graduate from a reputable college, as found by the board. He had not practiced ten years and he did not submit himself for an examination by the board.

In the case now before this court, it is admitted by the answer that the petitioner holds a diploma from a reputable and standard school of dentistry. The answer admits petitioner's allegation that petitioner tried to meet the requirements of the state board of dental examiners and took examinations three several times; but denies that the board arbitrarily refused to license petitioner to practice dentistry.

Petitioner is 38 years of age and graduated from a reputable dental college in 1909, and holds a diploma therefrom. Since his graduation, he has practiced his profession.

Under such circumstances, it is hard to reconcile the admission that the dental college from which he graduated was a reputable and standard dental college with the allegation that the refusal to grant him a license was not arbitrary. The facts admitted tend to defeat the conclusion alleged.

The most important distinction between the Dent case and the one under consideration is that, in the West Virginia statute there was something to guide the board of examiners in the course to be pursued by it in the examination. This, to some extent was pointed out, as shown above, for the act provided that the board

27 "shall examine him as herein provided, and if, upon full examination, they find him qualified to practice medicine in all its departments, they or a majority of them, shall grant him a certificate to that effect" (at 116).

This statute, to a limited extent, laid down a rule of action for the board to follow and rendered the question of whether the board had, in a given case, obeyed such rule capable of proof.

They were commanded thereby to examine the applicant in all the departments of medicine, and further commanded to find if he was qualified in such departments and further commanded, if they so found him, to certify to that effect.

There are no such directions in the Washington statute now before the court. Aside from the requirement of eligibility for examination, that is the right to be examined, all that is commanded is that

"all persons successfully passing such examination shall be registered as licensed dentists"

and the form of the certificate provided in the Washington law does not certify that the holder is qualified in any respect; nor does it certify anything save that the holder is licensed to practice dentistry.

The statute contains no regulation whatever covering the matter of said examination, save the preliminary question of eligibility of the applicant for examination, that is, the right to demand an examination depends upon the applicant's being of good moral character; presenting a diploma from a dental college in good standing, and giving satisfactory evidence of his, or her right to the possession of the same.

It seem to have been assumed, rather than decided, in In re Thompson (36 Wash., 377) that the statute contemplated an examination by the board after determining whether the applicant was
of good moral character and had a diploma from a dental
28 college in good standing. This interpretation of the meaning of the state statute by the Supreme Court of this state is binding upon this court.

In addition to the foregoing, defendants have cited and rely upon the following cases:

Watson v. Maryland (218 U. S., 173). The question before the court in that case was different from that here presented. It was whether the equal protection of the law guaranteed by the Constitution had been denied by reason of an unreasonable classification.

In Reetz vs. Michigan (188 U. S., 505), the question considered was whether judicial power had been conferred by the statute on the board of dental examiners. There was no question of the delegation of legislative power. The further question was raised in that case of due process—whether it was necessary to notify the applicant and give him a hearing on whether his tendered evidence of former registration was sufficient.

Rogers v. Jones (214 U. S., 196) was a suit for the removal of a cloud on title to land.

State v. Littooy (52 Wash., 87) was a case arising under the present law, but the question involved was as to the validity of the requirement of a diploma from a dental college as a prerequisite for an examination for a license to practice dentistry although there was no such college in the State of Washington.

In State v. Sexton (37 Wash., 110), the constitutionality of this act was again upheld, but solely upon the authority of State ex rel. Smith v. Board of Dental Examiners (31 Wash., 492) and In re Thompson (36 Wash., 377).

In State ex rel. Brown vs. Board of Dental Examiners (38 Wash.,
325), the court held that the questions and answers in an ex-
29 amination by the dental board were not admissible in court; that the court had no power to review the action of the board, unless it be arbitrary and fradulent to the extent of being a refusal to exercise its discretion. The present question was not discussed by the court, and, presumably, not considered.

In Brown v. State (59 Wash., 195), the constitutionality of the act was again before the court and it was held to be no longer an open question, upon authority of the cases already noticed.

In Wilkins v. State (16 N. E., 192(the dental examining board statute was not set out. The attack on the law was upon grounds other than those now being considered, being because the statute authorized the dental association, a corporation, to select the members of the board of examiners and because the board were invested with judicial, not legislative functions. Enough appears in the decision to show that it was not an uncontrolled power or discretion with which the board was clothed. It would appear from the language of the decision that the statute defined the qualifications entitling one to practice dentistry, for, among other things, the court says:

"* * * as we have seen, the legislature may prescribe the qualifications of those permitted to practice the profession. The board of examiners established under the law is the lawfully constituted authority, and from it the certificate required by law must be obtained. The legislature, as the law-making power, has authority to prescribe the method of procedure. Its authority does not end with declaring what qualifications he who enters upon the practice of that profession shall possess. As it has plenary power over the whole subject, it alone must be the judge of what is wise and expedient, both as to the qualifications required, and as to the method of ascertaining those qualifications" (at p. 193).

In State v. Creditor (44 Kan., 565; 21 Am. St. Rpts., 306), the statute before the court authorized all those in the state engaged in the practice of dentistry at the time of the passage of the act to continue such practice, but required that any one desiring to enter such practice after the passage of the act should present to the board for examination a diploma, which, if found valid by the board, entitled the holder to a license. The attack on the law was made because of claimed class discrimination between those practicing before the passage of the act and those seeking to enter the practice afterwards.

The case of People v. Griswold (106 N. E., 929) is to substantially the same effect.

State vs. Vandersluis (43 N. W., 789). This was a case where the Minnesota statute creating a board of dental examiners, attacked, was held valid by the court. The attack was made because of the requirement that the applicant for examination have a diploma from a dental college in good standing. The court says of the statute:

"It then goes on to prescribe the manner, extent, and subjects of the examination." (at p. 790).

These are the very things lacking in the Washington act.

In Eastman v. State (10 N. E. 97), the statute is not set out in the decision, but its requirements are indicated by the following from the opinion:

"* * * The statute does not require the clerk to sit in judgment upon the sufficiency of the application for a license; for the affidavits prescribed, and the diploma required, constitute the evidence upon which the clerk must act. The diploma and affidavits compel him to grant the license, and it is therefore not possible to regard his duty as a judicial one. Flournoy v. City of Jeffersonville, 17 Ind., 169; Betts v. Dimon, 3 Conn., 107; State v. Doyle, 40 Wis., 188." (at pp. 98 & 99).

There is no regulation in the statute under consideration concerning the subjects upon which the applicants shall be examined; no regulation as to the per-centages required to pass the examination; no regulation as to whether the examination shall be confined to the theory of dentistry; whether written, or oral, or whether the applicant's proficiency shall be determined by requiring him to demonstrate his skill with the tools and materials of his profession,
31 or whether the examination may include both methods. In fact, the letter of the statute does not even command or direct that the examination shall relate to his qualifications to practice dentistry. There is no requirement even that the board shall find the applicant competent and qualified in all, or any subjects related to his profession and, for that matter, no requirement that they shall find him qualified as to subjects co-related or unrelated to his profession. No tests for the determination of his fitness, either appropriate or unappropriate are provided.

No provision is made for the keeping of any records—either records made by the board or made in the process of examination by the applicant; neither a record for the purpose of review, in case of dissatisfaction or complaint, nor as a precedent and guide for future examinations.

Section 8415 does provide*d* that

"three members of said board shall constitute a quorum and the proceedings thereof shall at all reasonable times be open to public inspection".

This language does not contemplate a record of the proceedings; but that the meetings at which the examinations are held, and the proceedings during and at such meeting shall be open at all reasonable times.

The board is not required to give the applicant any notice of his standing; nor is it required to inform him whether he has passed or not, or why he has not passed. The board is not even charged with the duty of making regulations, uniform or otherwise, as to examinations, which would insure, in some degree, uniformity of treatment accorded applicants and the public.

There is no restraint in the statute preventing one applicant's passing an examination solely on subjects and by methods not mentioned to another also passed and licensed by the board; and nothing to prevent one applicant's being passed and another rejected, al-

though the latter had admittedly passed as good, or better examination.

32 The only regulation as to the examination, not already pointed out is that the board shall meet at least twice each year, in May and November, and that, 30 days' notice shall be given by publication in at least four newspapers. The place of holding the examination is not provided by the statute.

If a record were made up of the proceedings of the board in a given case, and the same were brought to a court, or other authority for review, the statute affords no rule or guide that would enable the reviewing tribunal to determine whether or not, right or wrong had been done. This would simply result in making such court, or reviewing board a supervising autocrat, to arbitrarily determine the claims of the applicant and substitute its arbitrary determination for the arbitrary determination of the board.

This statute, as interpreted in the Thompson case (supra) is not a lawful exercise of the police power, but, under the guise of the police regulations, on its face, clothes the board with arbitrary, autocratic and undefined powers and is, therefore, itself, an unwarranted and arbitrary interference with the petitioner's constitutional right to carry on a lawful business. The case is not one of the board's abuse of powers lawfully conferred; but the abuse and wrong consist in undertaking to confer unlimited powers. (Dobbins v. Los Angeles, 195 U. S., 223).

The upholding of this statute would, in this particular, make the government one of men, rather than law, for there is no curb or limit in the law to the exercise of the will of the board. If its members will that one be licensed and another not, it is so. It is not law that one should hold the means of living by such a tenure, at the will of another (Yick Wo vs. Hopkins, 118 U. S. 356 at 370).

33 All that the letter of this law requires is that the board shall examine the applicants presenting themselves for that purpose and, even that duty, is not expressly commanded. The letter of the law goes no further than to infer that the board shall examine the applicants, how, or for what, there is nothing to indicate. There is nothing in the letter binding or defining the character, degree, or particulars or qualifications for which the applicant shall be tested. Nor, for that matter, does the letter of the law command that it is the qualifications of the applicant to practice dentistry that the board is charged with the duty of investigating. Such duty must be inferred. Being so unaided by the letter of the law, its spirit is so elusive that it may be all things to all men, or rather anything to any man, which is only to say, that arbitrary power is conferred and that the applicant, in appearing for examination, subjects himself to the mere favor, spite, whim, caprice or will of the board members. If so, our vaunted liberty is, indeed, shrunk to narrow compass.

Considering the unbridled power which is attempted to be conferred by the statute, the logic of the Washington court in the later cases of Seattle v. Gibson (96 Wash., 425) and State ex rel. Makris

vs. Pierce County (vol. 13, No. 8, Wash. Dec., p. 255) is more satisfying to the reason—not only because it is of later pronouncement, but because of its inherent strength—than what is said by the same court in the Thompson case above quoted.

In the Gibson case, the court was considering a statute providing for the licensing of pharmacists, which reads:

"the city comptroller shall report the petition to the city council, which shall refer the same to the license committee, which committee shall consider such petition and may, in its discretion, investigate any of the matters set forth therein, and report its findings and recommendations thereon to the city council, and if said committee recommends that said petition be granted, shall accompany such recommendation with a proposed ordinance granting the license petitioned for." (at p. 428)

31 Of the foregoing, the court says:

"It is plain from this provision of the ordinance that the license committee is vested with discretion to report either favorably or unfavorably to the city council. If this discretion is exercised favorably, and a recommendation that a license be issued is made by the license committee, it shall report an ordinance granting the license petitioned for. The ordinance also provides that every license shall be granted by ordinance of the city, that is, before an applicant for a license may receive the same, a special ordinance must be passed granting a special privilege, and the passage of such ordinance rests wholly in the discretion of the city council.

"*The ordinance in question here makes no provision for determining the qualifications of an applicant.* It does not require the license committee, to whom the petition is referred, to investigate any of the facts stated in the petition of the applicant. The committee may investigate or not as its discretion dictates. In short, the ordinance leaves to the license committee the authority arbitrarily to grant or reject a petition for a license to operate or conduct a drug store and pharmacy. *This discretion is purely arbitrary under the ordinance, because no standard of qualifications, nor rule, is fixed upon which an investigation may be made.* The ordinance recites that the committee may, in its discretion, investigate any of the matters set forth in the petition, and if it may investigate these matters in its discretion, it may not investigate them at all, and may report according to its desire." (at pp. 428 and 429.)

The above italics are those of this court.

In State ex rel. Makris vs. Pierce County, supra, the commissioner of public safety at Tacoma had revoked the license of plaintiff to conduct a soft drink and candy business and threatened to close his place. The ordinance for licensing such a business provided that, after application, the city commissioner should

"inspect, or cause to be inspected, the premises where such business is to be conducted. If the premises are found to be in a sanitary

condition and to comply in all respects with the provisions of the health and food ordinances of the city of Tacoma relating thereto, and if the premises conform to the building regulations and in no way menace the peace and good order of the community, said commissioners or their representatives shall recommend to the City Clerk that such license be issued."

The ordinance further provided:

35 "The license of any business mentioned in this section may be revoked by the Commissioner of Public Safety *in his discretion for disorderly or immoral conduct or gambling on the premises, or whenever the preservation of public morality, health, peace or good order shall in his judgment render such revocation necessary.* Such revocation shall be subject to appeal to the City Council, to be prosecuted by filing a written notice with the Council within ten days after the revocation. Upon receipt of such appeal the council shall appoint a day for hearing the appeal, giving the appellant at least three days prior notice in writing thereof. The decision of the Council shall be final." (at p. 257.)

(The italics are those of this court.)

Under the latter provision the commissioner of public safety assumed to revoke plaintiff's license because in his opinion

"the business, *as conducted by Makris, had become a menace to 'the preservation of public morality, health, peace and good order.'*" (at p. 257.)

In disposing of the question of the constitutionality of the ordinance, the Washington court says:

"The argument here made in behalf of Makris is, in substance, that the effect of the provisions of the ordinance authorizing the revocation of the license, is to place in the hands of the commissioner of public safety and in turn in the hands of the city council upon appeal from the commissioner, the arbitrary power, uncontrolled by any prescribed rule of action, to effectively decide who may and who may not engage in, and carry on, the manifestly lawful business of selling soft drinks and candy in the city. As we read the ordinance such is the meaning of its terms. It may be that the authority to revoke the license because of the permission by the licensee, or 'gambling on the premises,' is a sufficient prescribing of a cause for revoking the license, and that the revocation provisions of the ordinance in so far as that cause alone is concerned might be upheld, if that specified cause for revoking the license be sufficiently separable from the other provisions of the ordinance, to stand alone.

"That, however, is not the question before us. That is not claimed as the cause for revoking this license. There is no other specifically prescribed cause for revoking the license or specifically prescribed rule of action which limits or controls the commissioner or the city council in deciding the question of revoking the license. This

means that the commissioner, and in turn the city council, may, according to their own notions of what is a menace to 'the preservation of public morality, health, peace or good order' in each
36 particular case, decide who may and who may not engage in business of this character in the city. In other words the commissioner is left to determine for himself, *not only what acts may have been committed by the licensee*, but also whether or not such acts are 'disorderly or immoral', or are a menace to the 'preservation of public morality, health, peace, or good order' warranting revocation of the license. Manifestly upon appeal to the city council that body is not, by the terms of the ordinance, controlled by any more specifically prescribed rule of action; but like the commissioner, is a law unto itself in each particular case when the question of revocation of a license comes before that body.

"Our decision in Seattle v. Gibson, 96 Wash., 425, 165 Pac., 109, is practically decisive of this case in principle, in favor of Makris, though the license ordinance there involved sanctioned a somewhat plainer usurpation of arbitrary power than does this ordinance, in that it made no attempt whatever to prescribe any rule touching the question of who should be granted a license and who should be refused a license, to conduct a drug store. It is true, in that decision particular mention is made of the fact that the license might under the terms of the ordinance, be granted or refused without even an investigation or hearing touching the merits of the application therefor; but the law invoked in support of our conclusion that the ordinance was void, in that 'this discretion is purely arbitrary under the ordinance, *because* no standard of qualifications nor rule, is fixed upon which an investigation may be made', (using the words of the decision), citing and quoting from Yick Wo v. Hopkins, 118 U. S., 356; County of Los Angeles v. Hollywood Cemetery Assn., 124 Cal. 344, 57 Pac. 153, 71 Am. St. 75; State v. Mahner, 43 La. Ann. 496, 9 So. 480; and State ex rel. Garrabad v. Dering, 84 Wis. 585, 54 N. W. 1104, 36 Am. St. 948, 19 L. R. A. 858, is, we think, decisive of this case in favor of Makris. All of those decisions were rested upon the principle that an ordinance which authorizes the issuing or withholding of a license to engage in a lawful business, that is, a business which within itself is ordinarily perfectly lawful, and committing to any officer or set of officers the power to decide according to their own notions in each particular case, the question of the propriety of issuing or withholding a license therefor, and thus deciding who may and who may not engage in such business, is authorizing the exercise of arbitrary power in violation of the guaranty of the Fourteenth Amendment of the Constitution of the United States, that 'No state shall * * * deny to any person within its jurisdiction the equal protection of the law'. In Section 12 of Article 1 of our state constitution we find the same guaranty, in substance, as follows:

" 'No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.'

37 "Our decision in Seattle v. Gibson, supra, and those of the federal and state courts upon which that decision is rested, render it plain that it is sufficient to *render a law or ordinance void in the light of these* constitutional guarantees, if the *prescribed* manner of administering such law or ordinance *results in leaving the question of the propriety of issuing, withholding or revoking a license to conduct an ordinarily lawful business, and thus the question of who may and who may not engage in such business, to the decision of any officer or set of officers, uncontrolled by any prescribed rule of action.*

"Among the many additional authorities lending support to this view of the law, we note the following:

"The case of City of Elkhart v. Murray, 165 Ind., 304, 75 N. E., 593, 112 Am. St. 228, 1 L. R. A. 940, is particularly enlightening and persuasive upon this question. In that case there was involved an ordinance of the city requiring the use on street cars of fenders of a particular make, 'or some other fender equally as good, to be approved by the common council or its street committee'. The ordinance was held void because of the uncertainty of the standard prescribed, in that, whether some other fender than that named was equally as good, was left to the decision of the city officers. In the course of the opinion Chief Justice Monks, speaking for the court, said:

" 'The ordinance must contain permanent legal provisions operating generally and impartially upon all within the territorial jurisdiction of such city, and no part thereof be left to the will or unregulated discretion of the common council or any officer. If an ordinance upon its face restricts the right of dominion which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the city authorities, it is invalid, because it fails to furnish a uniform rule of action, and leaves the right of property subject to will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons.'

"Numerous authorities are then cited in support of this view. The Chief Justice then proceeding, referring to one of the court's prior decisions, said:

"In Bessonies v. City of Indianapolis, supra, at page 197, this court said: 'Without any provision as to the location or management of hospitals, the ordinance attempts to make it unlawful for anyone to establish or conduct one without a license or permit from the common council and board of alderman; and *the granting or refusal of the license or permit is not governed by any prescribed rules, but rests, in such case in the uncontrolled discretion of the common council and board of aldermen.* It is apparent that, under the ordinance, if valid, the common council and board of alderman have
38 the power to grant or refuse the license in any given case at their mere pleasure; and that no one can conduct or maintain

a hospital within the city, however harmless or beneficial it might be, except by the consent of the common council and board of aldermen. It is not necessary to suppose that the common council and board of aldermen would abuse the power thus assumed by them, to grant or refuse the license as they might think * * * for the public good. It is sufficient to say that, if the ordinance is valid, the common council and board of aldermen have it in their power to grant one person a license and refuse another, under the same circumstances. No law could be valid, which, by its terms would authorize the passage of such an ordinance. The twenty-third section of the Bill of Rights provides that 'the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' What the legislature cannot do directly in this repect, it cannot authorize a municipal corporation *do* do' " (at pp. 258 to 262). (Italics those of this court.)

The Washington court, in the Makris case, also considered Portland v. Traynor (94 Ore., 418) and found the same difference between the ordinance in question before the Oregon court and the one held invalid by the Washington court in the Makris case which we have already pointed out between the West Virginia statute, considered in the Dent case, supra, and the one now before this court. This is shown by the following quotation by the Washington court from the Oregon decision:

"* * * as we construe it, the ordinance in question is certain and definite in its terms. It provides if, upon investigation, *the location 'is found to be suitable for a food establishment and in proper sanitary condition* according to the ordinances of the City of Portland and the regulations of the United States with reference to plumbing, water supply, ventilation and cleanliness, the bureau of health shall issue such applicant a food establishment permit' " (at p. 263).

The italics are those of this court.

The ordinance, by using the language quoted by the court, laid down a rule of action to be followed by the board; (Whether
39 sufficient or not, it is not for this court to decide) and, to that extent, it supplied that which is wanting in the dental board statute before us.

It is true that in the Makris case, the Washington court says:

"We do not in our present inquiry take note of decisions which have to do with the granting of licenses for the sale of intoxicating liquors, the maintenance of pool rooms, *the practice of professions*, or entering upon occupations more or less dangerous to others, looking to the personal qualifications of the licensee. As to such licenses there is necessarily involved *some measure of discretion* to be exercised by the officer or body charged with the duty of deciding who may or may not engage in such businesses, professions, or occupa-

tions. Such cases do not deal with constitutional rights *so clearly ascertainable* as those drawn in question in this case" at p. 261).

The italics are those of this court.

Doubtless there is need for clothing with a wider discretion those charged with the duty of determining the qualifications of a person to engage in the professions than of those whose duty it is to act with regard to readily observed and determined physical conditions; nevertheless, there are well known, recognized and established methods and rules for measuring the storehouses of the mind and the cunning of the hand in the arts, trades and sciences. There is no right in the legislature to delegate the exercise of discretion, beyond what is reasonably necessary.

In Dent vs. West Virginia (129 U. S., 114), the Supreme Court of the United States says:

"* * * It authorizes an examination of the applicant by the Board of Health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the State a designated period before March, 1881. If, in the proceedings under the statute, there should be any *unfair or unjust* action on the part of the Board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the State. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the Board after it had decided that the diploma be presented was insufficient" (at pp. 124 & 125). (Italics those of this court.)

40 This amounts to an assurance that a remedy will be found for wrongs done by such a board.

In State ex rel. Brown v. Board of Dental Examiners (38 Wash., 325), the complaint was that the Board of Dental Examiners fraudulently denied a license to practice, not because of petitioner's failing to pass the examination, but because the applicant refused to subscribe to a certain code of ethics presented to him by the board. In this case the court held that it would have been reversible error to have admitted the questions, answers and other documents relating to the examination, and said:

"* * * The general rule is well established that the courts cannot review the discretion which has by law been vested exclusively in inferior tribunals, and mandamus will therefore not lie to compel the performance of acts or duties which necessarily call for the exercise of discretion on the part of the officer or board at whose hands their performance is required; because the state has, as in this instance determined upon and specified the officers upon whose *judgment on the questions submitted* to them the state is willing to rely." (at pp. 328 & 329).

The italics are those of this court.

The only criticism of the foregoing is that the statute does not define the questions that are submitted to the board's judgment. The statute simply leaves it to the board to say whether those of good moral character holding diplomas shall, or shall not be licensed to practice dentistry.

The Washington court further says:

"* * * The action of the court must, in reality, be based upon the assumption that the inferior tribunal has refused to exercise the discretion with which it is clothed; because, if it acts arbitrarily or fraudulently, or through unworthy or selfish motives, or conspires against the rights of individuals, under the law, and therefore against the law, itself, it has not strictly, as is frequently said, 'abused its discretion'—a term which is responsible for some confusion of ideas on this subject—but in contemplation of law, it has not exercised its discretion at all, but has sought to substitute arbitrary and fraudulent disposition and determination of the question submitted, for the honest discretion demanded by the law. In such cases the law will, by mandamus, compel the tribunal to act honestly and fairly, or, in other words, to *exercise its discretion;* and, when this distinction is kept in mind, the seeming difficulties which have surrounded this question, and which have caused so much discussion, disappear.

41 "But in the light of the record in this case, these abstract principles are scarcely involved; for, while it is at least theoretically true that there is no wrong without a remedy, there is no allegation of any wrong in the petition in this case upon which the appellant *was denied a hearing.*" (At pp. 328 & 329.) (Italics those of this court.)

It is well settled practice in the Federal court to admit in evidence the examinations—including questions and answers propounded to, and given by immigrants applying for admission to the United States, and the various witnesses in deportation cases (cases in which, not the rights and liberties of citizens are involved, but merely the rights of aliens to enter the United States), in order to determine whether the action and rulings of the officers and boards considering the same have been arbitrary or capricious, and, necessarily, would it be so if the charge were that fraud was involved, because of the great latitude allowed in cases of the latter character.

The decision of the Washington court in the Brown case, supra, and what is said above hardly appear to this court to be the full measure of relief which the language quoted from Justice Field's opinion, supra, gives promise. The greatest latitude is, ordinarily, allowed where the purpose or intent with which an act had been done is charged to have been fraudulent, that is, concealed and dishonest; and, despite the ruling in the foregoing case, and while we have not the record before us, it would appear that the "questions, answers and other documents" relating to the examination, therein attacked, might reasonably be expected to throw some light upon the intent, motive and purpose of the board in refusing applicant a license.

While, no doubt, the executive's appointees may formulate rules and regulations supplementing to some extent the law, where authority is expressly conferred so to do, and while the courts are not prone to interfere with the exercise of such discretion, as is shown by the numerous decisions which we have reviewed
42 and considered, it is not consistent with our system of government that the executive shall both make and execute the law.

If law be a rule of action, then section 8416 is no law, for, while it undertakes to authorize the board to act—to examine, it gives the board no rule by which to act. In the regulation of such matters, the need of some exercise of judgment and discretion, no doubt, exists, and the line of demarkation, the bounds of such legal discretion, must ever remain difficult of determination.

The Board of Dental Examiners, under this act, from the dental graduates of good moral character presenting themselves, may simply appoint, as they see fit for any reason, dentists to practice.

A power so unconfined and unrestrained as that sought to be conferred by this section authorizes, in no proper sense, the exercise of discretion, but rather, the exercise of autocratic and arbitrary power.

The part of the statute requiring the examination should be, and is, held inoperative and of no effect.

The temporary injunction prayed for will be issued.

Concurring: Gilbert, C. J. and Neterer, D. J.

Indorsed: Filed in the United States District Court Western District of Washington, Northern Division, Apr. 15, 1921. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

43 In the District Court of the United States, Western District of Washington, Northern Division.

In Equity.

No. 233.

LEON NOBLE, Complainant,

v.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Petition for Rehearing.

Come now the defendants herein and petition the court for a rehearing for the reason that the decision of the court heretofore announced in its Memorandum Decision filed April 15th, 1921, is erroneous in the following respects:

1. The court was in error in its statement upon page 3 that the defendants "admit the material allegations of fact in the complaint."

2. The court failed to give to the decisions of the Supreme Court of Washington construing and applying the dental statute, their proper credit.

3. The court erred in its conclusion that the dental law is unconstitutional.

I.

Arbitrary Action.

Upon page 3 of the memorandum decision the statement is made that "defendants have answered, and, while denying complainant's conclusions, admit the material allegations of fact in the complaint." This statement is correct in so far as the case depends upon the constitutionality of the dental law. If the law is unconstitutional, we concede that the admissions of the answer are sufficient to show that complainant is sufficiently affected to entitle him to an
44 injunction. The bill of complaint, however, in addition to alleging the unconstitutionality of the statute, further alleges that the board arbitrarily refused to grant complainant a license to practice dentistry.

Paragraph 11 of the affirmative defense pleaded in the answer admits that the complainant has tried to meet the requirements of the board, but denies "that said board arbitrarily refused to grant him a license as alleged in the bill of complaint." At the hearing no evidence was offered which in any way tended to show arbitrary action upon the part of the board, but the complainant submitted his case upon the first ground only. The decision therefore should be modified in any event to show that the conclusion of the court was based solely upon that ground and not upon the additional ground that this board had applied a constitutional statute in an unconstitutional manner.

II-III.

The Merits.

The conclusion of the court that the act is unconstitutional appears to be based mainly, if not entirely, upon the fact that section 8416, Rem. 1915 Code, providing for the examination of applicants for a license to practice dentistry, does not expressly indicate the general nature of these examinations. We quote from page 6 of the opinion, where it is said:

"The issue at bar, concisely stated, is the inoperative effect of the provision of the dental act requiring the holder of a diploma to present himself at a meeting of the dental board 'to undergo examination before that body.'"

Upon page 10 of defendants' decision, this court, in referring to the decision of the state supreme court in the case of In Re Thompson, 36 Wash. 377, construing this statute, said:

"This interpretation of the meaning of the state statute by the Supreme Court of this state is binding upon this court."

We would supplement this statement by referring to the case of Quong Ham Wah Co. v. Industrial Accident Commission, 41 Sup. Court Rep. 373, decided March 21, 1921, where the Supreme
45 Court of the United States said:

"But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state."

After citing a large number of authorities upon this, the court further continued:

"True it is elaborately argued that the court below erred in supposing that the statute was susceptible of the construction which it affixed to it, and that, instead of adopting that construction, its duty was to hold the statute void for repugnancy to the Constitution on the grounds which were urged. But this in a different form of statement but disputes the correctness of the construction affixed by the court below to the state statute, and assumes that that construction is here susceptible of being disregarded upon the theory of the existence of the discrimination contended for when, if the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the federal question relied upon."

See also In Re Lockwood, 154 U. S. 116.

The primary question then is what, if any, construction of the state law has been announced by the state court. If such a construction exists and the statute is constitutional, under that construction, then, this court is without power to interfere whatever may be its views with respect to the soundness of the conclusion reached by the state tribunal.

The case of In Re Thompson, supra, was an original proceeding instituted in the state supreme court to obtain the release of a person detained in custody after conviction of the crime of practicing dentistry without a license under this act. Petitioner's case was grounded, among other things, upon the fact that section 4 of the act (sec. 8416, Rem. 1915 Code) conferred arbitrary powers upon the board of dental examiners, exactly the same contention which is made in the case at bar. We have examined the briefs of the petitioner in that case which are on file in the law library of the state supreme court at Olympia, and we find that substantially the same arguments were advanced with respect to this point as are expressed by this court in its memorandum decision. Upon page 13 of petitioner's opening brief, the following appears:

46 "Nothing is said about what they shall be examined in, nor to what extent, nor what the examination shall be, whether physical or otherwise; nor does it say that the examination

shall relate to dentistry, or test the qualifications of the applicant to practice dentistry."

Again, upon page 15, petitioner contended:

"The act does not control and regulate the action of the board. The board in prescribing an examination, to which all must submit, and setting up standards of qualifications, according to its own will and caprice to be enforced or not enforced as they see fit, or in such manner as they see fit, is acting entirely outside the domain of law and in the realm of the lawless; such action is not warranted by law, and is actually forbidden by the fundamental law of the land."

The same argument was again reiterated upon page 17 of the opening brief and also upon pages 2 and 3 of petitioner's reply brief. We have referred to this with some particularity for the reason that the memorandum decision apparently overlooks an important statement made in the Thompson case. The conclusion of the state court is set forth upon page 7 of the memorandum decision. We call particular attention to the clause which reads: "and to conduct the examinations upon subjects reasonably required in that provision." In other words, when the state of the issues is considered, when it is remembered that the same objections were made there as are made here, we think that a proper respect for the decision of the state court must justify the conclusion that this is a square holding that the examinations must be conducted upon subjects reasonably required in the practice of dentistry. If this be so, then, the statute as thus construed falls squarely within the purview of Dent v. West Virginia, 129 U. S. 114, which is analyzed upon page 8 of the memorandum decision.

Upon page 7 of the decision the above quoted portion of the Thompson case is referred to in the following language:

"The court evidently assumed that the board had adopted such rules and that they were reasonable rules, and, inferentially, that they had followed such rules; and further that they could be depended upon to continue to do so. This appears to us to be a non-sequitor."

We submit that this is not a correct construction of the
47 state court's decision. The court was addressing itself to the identical subject herein involved, and when it said that in the absence of evidence to the contrary it would be presumed that any examinations would be upon subjects reasonably required in the provision, it certainly meant that the act required this to be done.

Even if it be assumed, however, that these remarks of the state court in the Thompson case were either dictum or else referred to the action of the board and not the construction of the statute, the relief should nevertheless be denied for another reason. This court cannot deny that section 8416, supra, is susceptible of the construction which was at least suggested in the Thompson case. The act relates to the practice of dentistry. The preceding portions of the

section have a direct relation to the qualifications of an applicant to practice said profession. When those qualifications are followed with the statutory command that the applicant shall be examined before a license issues, it certainly does no violence to any rule of statutory construction to conclude that those examinations of necessity must be considered as restricted to matters which have a direct relation to the qualifications of the applicant to engage in the profession. Such a construction is possible, and since the state court has not denied it, but upon the contrary has at least suggested it, the case should be dismissed upon the authority of Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531-546, where the court said:

"For in cases other than such as arise under the contract clause of the Constitution, it is the appropriate function of the court of last resort of a State to determine the meaning of the local statutes. And in exercising the jurisdiction conferred by section 237, Judicial Code, it is proper for this court rather to wait until the state court has adopted a construction of the statute under attack than to assume in advance that a construction will be adopted such as to render the law obnoxious to the Federal Constitution. Bachtel v. Wilson, 204 U. S. 36, 40; Adams v. Russell, 229 U. S. 353, 360."

48 The fact that this court as an original proposition might not be inclined to adopt this construction does not authorize it to disregard this rule.

The fundamental error of the memorandum decision, we think, is found in that portion of the decision upon page 7, where it is said:

"The question of whether arbitrary power is included in the terms of a statute is not to be determined by ascertaining whether arbitrary action has been had under it, else we would be compelled to conclude in one case that arbitrary power had been conferred by a statute because arbitrary action was taken under it, and in another that arbitrary power had not been conferred by a statute because, forsooth, in the particular case considered, there had been no arbitrary action under it."

We have already shown our reasons for believing that this statute does not confer arbitrary power. If it is meant by this statement that a statute which confers unlimited power upon an executive officer is unconstitutional because it does not expressly limit that power, then we would say that it is diametrically opposed to the view heretofore adopted by the Supreme Court of the United States.

We are content to rest our case upon this point upon the decision of that court in State ex rel. Lieberman v. Van DeCarr, 199 U. S. 552. In that case the court had before it the question of the validity of section 66 of the sanitary code of New York City, which provided:

"No milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the board of health, and subject to the conditions thereof."

The court will observe that this section was as wholly lacking in any express limitation upon the power of the board of health as is the dental law. If the conferring of power without express legislative restriction is unconstitutional, as this court holds upon page 7 of its decision, then this section of the sanitary code of New York City was likewise unconstitutional. The court will observe further that the sanitary code did not establish any standard for
49 the guidance of the board of health; neither did it prohibit discrimination or arbitrary action. The court will note further that there was no provision for the preservation of a record of proceedings had before the board, that no judicial review was provided for, and neither was there notice and hearing. The section was attacked, among other things, upon the ground that it conferred "upon the board of health absolute and despotic power to grant or withhold permits to milk dealers, and is, therefore, not due process of law." The state court had sustained the statute upon the ground that under a reasonable construction it did not permit unjust discrimination between the applicants. That court, however, did not even go as far as did the Washington court in the Thompson case, because its decision left the question of the standard to be followed by the board in the original discretion of that board, subject only to the limitation that its action must not be arbitrary. Neither the opinion of the court of appeals of New York nor the appellate division, both of which are set forth in the decision of the Federal court, pointed out the nature of the limitations imposed upon the board. In other words, the New York court, like this court, in State ex rel. Brown v. Board of Dental Examiners, 38 Wash., 325, merely said that since the general subject was within the police power, the statute would be sustained, but that the powers conferred would have to be exercised in a reasonable manner. What was a reasonable manner was neither pointed out in the statute nor by the decision of the state court. After reviewing these decisions, the Supreme Court said:

"We do not think that this language leaves any question as to the disposition of the highest court of New York to prevent the oppression of the citizen or the deprivation of his rights, by an arbitrary and oppressive exercise of the power conferred. That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power
50 of the states to protect the health and safety of its people, there can be no doubt."

After reviewing a number of its decisions, the court then concluded:

"In such cases it is the settled doctrine of this court that no Federal right is invaded, and no authority exists for declaring a law unconstitutional, duly passed by the legislative authority, and approved by the highest court of the state."

We submit that this decision squarely holds that in matters involving the police power, unlimited powers may be vested in a state administrative body and that so long as the state courts will protect the citizen against an exercise of that power which infringes upon the constitutional rights of the citizens, the Federal courts will not interfere, or, to state the same thought in a different way, a statute passed in the exercise of the police power which confers unlimited powers from the very nature of its subject matter restricts those powers to such acts as have a relation to the particular phase of the police power involved. The case at bar does no more than this. We are not prepared to say that in a proper case this court might not protect the citizens against the arbitrary action of this board should the state courts refuse to act. As is pointed out in the Lieberman case, however, the possibility of arbitrary action under a statute does not make the statute unconstitutional; otherwise no statute could ever be sustained. The error of the court's opinion lies in the fact that it has failed to distinguish the difference between a statute which commands a public officer to perform an unconstitutional act and one which commands him to do a valid act without expressly prohibiting him from doing an illegal act under the guise of obeying the command of the statute.

In the first case, the statute falls, because there is nothing upon which it may legally operate; in the second, the statute stands, but the unlawful act of the officer thereunder may be restrained. We must confess that we were perhaps at fault in not calling the attention of the court to this decision before. We can only plead that
51 we did not fully anticipate the course which the argument would take, and for that reason overlooked it. We would respectfully urge that before passing upon this petition the court read this case quite carefully. We believe it to be clearly in point and to answer the objections noted in the memorandum decision. Certainly it is close enough to at least entitle defendants to a rehearing in this matter.

The suggestion made in that portion of the memorandum decision beginning upon page 21 that the act offends the due process clause because the state court in State ex rel. Brown v. Board of Dental Examiners, 38 Wash. 325, refused to re-examine the questions and answers, there being no contention that the board had acted arbitrarily in that particular respect, is conclusively answered by the decision of the Supreme Court of the United States in Reetz v. Michigan, 188 U. S. 505-507, where it was held that a board of medical examiners could be given final power to pass upon the qualifications of applicants and that the failure of the act to provide for an appeal to the courts from a decision of the board did not make the act wanting in due process. It is answered also by the statement in Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531-547, where the court said:

"It is further objected that the statute provides for no appeal from the determination of the tribunal. But in such cases the right of appeal on other than constitutional grounds may be conferred or withheld, at the discretion of the legislature. As already pointed out, an appeal on fundamental grounds in this instance seems to inhere in

the very practice prescribed by the statute for the enforcement of the determination of the statutory tribunal. Were this not expressed in the act, it would none the less be implied, at least so far as pertains to any violation of rights guaranteed by the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U. S. 356, 370; Liberman v. Van De Carr, 199 U. S. 552, 562."

Furthermore, the decision in the Brown case but announces a rule of evidence in proceedings in the state court, a rule which need not be followed in the Federal court, and which is not adopted pursuant to any command of this statute.

"When the parties have been fully heard in the regular
52 course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States." Central Land Co. v. Laidley, 159 U. S. 103-112.

"But error of a trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law." Jones v. Buffalo Creek Coal & Coke Co., 245 U. S. 328-329.

We have gone into this matter with some particularity because the precedent involved is of immense importance to the people of the state of Washington. The direct relation between the practice of dentistry and the general public health and welfare is too well settled to even require discussion. The legislature of this state will not again convene until 1923. An appeal of this case to the Supreme Court of the United States cannot be heard within a year, or perhaps a longer period of time. During this interim the decision of this court, if adhered to, will leave the people of the state at the absolute mercy of every incompetent person who may elect to engage in the practice of dentistry. The court concedes a doubt as to the construction announced by the state court in the Thompson case. Its conclusion is not based upon any decision of the United States Supreme Court which is analagous in point of fact, and is, we submit, directly contrary to at least one decision of that tribunal. For these reasons we again respectfully petition the court that a re-hearing be granted.

Respectfully submitted,

L. L. THOMPSON,
Attorney General;
MALCOLM DOUGLAS,
Prosecuting Attorney, King County;
BERT C. ROSS,
Deputy Prosecuting Attorney, King County,
Attorneys for Defendants.

53 Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division. May 16, 1921. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

54 In the District Court of the United States, Western District of Washington, Northern Division.

In Equity.

No. 233.

LEON NOBLE, Complainant.

vs.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Memorandum Decision on Petition for a Rehearing.

Filed June 6, 1921.

J. W. A. Nichols, Esq., Browder Brown, Esq., for complainant.
Hon. L. L. Thompson, Attorney General, for Defendants.
Hon. Malcolm Douglas, Prosecuting Attorney.
Hon. Bert C. Ross, Deputy " "

CUSHMAN, *District Judge:*

After due consideration, the petition for a rehearing is denied.

55 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 233.

LEON NOBLE, Complainant,

vs.

MALCOLM DOUGLASS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Washington, Defendants.

Judgment and Decree.

This cause having been tried to the Court before the Honorable William D. Gilbert, Circuit Judge; Honorable Edward E. Cushman, District Judge, and Honorable Jeremiah Neterer, District Judge, and the court having made and caused to be filed herein its memorandum opinion and decision, now on motion of complainant it is by the Court ordered, adjudged and decreed:

That the temporary restraining order heretofore issued herein be and the same is made perpetual, and that the said defendants, and their deputies, agents, assistants and successors be and they are hereby enjoined and restrained from making or filing or causing or permitting to be made or filed any information or complaint against the complainant Leon Noble under the statutes of the State of Washington known as the Dental Code, being sections 8412 to 8425 in-

clusive of Remington's Code, or from prosecuting or permitting to be prosecuted any such information or complaint and from enforcing or attempting to enforce said statutes against said complainant and from interfering in any way with said complainant in the practice of dentistry under or by virtue of said statutes.

EDWARD E. CUSHMAN,
Judge.

O. K. except as to allowance of costs.
BERT C. ROSS,
Deputy Prosecuting Attorney.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, June 17, 1921. F. M. Harshberger, Clerk, S. E. Leitch, Deputy.

56 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity.

No. 233.

LEON NOBLE, Complainant,

v.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Petition for Appeal.

To the Honorable Edward E. Cushman, District Judge:

The above named Malcolm Douglas and Bert C. Ross, Prosecuting Attorney and Deputy Prosecuting Attorney respectively of King County, Washington, feeling themselves aggrieved by the decree rendered and entered in the above entitled cause on the 17th day of June, A. D. 1921, do hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignments of error filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order
57 relating to the security to be required of them be made.

L. L. THOMPSON,
MALCOLM DOUGLAS,
BERT C. ROSS,
Attorneys for Defendants.

431 County-City Building,
Seattle, Washington.

Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 1, 1921. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

58 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 233.

LEON NOBLE, Complainant,

v.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Bond on Appeal.

Know all men by these presents, That we, Malcolm Douglas and Bert C. Ross, Prosecuting Attorney and Deputy Prosecuting Attorney respectively of King County, Washington, as Principals, and United States Fidelity and Guaranty Company, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland and authorized to do surety business in the State of Washington, as Sure*by*, obligors, are held and firmly bound unto the above named Leon Noble, Obligee, in the sum of One Thousand Dollars ($1,000.00) to be paid to him, and for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our, successors jointly and severally firmly by these presents.

Sealed with our seals and dated the 27th day of June, 1921.

Whereas the above named principal obligors, defendants, seek to prosecute their appeal in the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the United States District Court, for the Western District of Washington, Northern Division,

Now, therefore, the condition of this obligation is such that if the above named principal obligors, defendants, shall prosecute their appeal to effect and answer all costs and damages, if they shall
59 fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

MALCOLM DOUGLAS,
BERT C. ROSS,
Prosecuting Attorney and Deputy Prosecuting Attorney Respectively of King County, Washington.
[Corporate Seal.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By JOHN C. McCOLLISTER,
Atty. in Fact.

The within bond is approved both as to sufficiency and form this 1st day of July A. D. 1921.

JEREMIAH NETERER,
Judge.

Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 1, 1921. F. M. Harshberger, Clerk, By S. E. Leitch, Deputy.

60 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity.

No. 233.

LEON NOBLE, Complainant,

v.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Order Allowing Appeal.

On motion of L. L. Thompson, Malcolm Douglas and Bert C. Ross, solicitors and counsel for defendants, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of One Thousand & 00/100 Dollars ($1,000.00), the same to act as a bond for costs and damages on appeal.

Dated at Seattle, Washington, this 1st day of July, A. D. 1921.

JEREMIAH NETERER,
Judge.

Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 1, 1921. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

61 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity.

No. 233.

LEON NOBLE, Complainant,

v.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Assignments of Error.

Now come the defendants in the above entitled cause and file the following assignments of error upon which they will rely upon their prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 17th day of June, 1921.

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in denying defendants' prayer for the dissolution of the temporary injunction granted in the above entitled action.

II.

That said District Court erred in denying defendants' prayer for the dismissal of plaintiff's bill of complaint.

III.

62 That said court erred in granting an injunction perpetually enjoining and restraining these defendants and their agents, servants and assistants from enforcing or attempting to enforce §§ 8412 to 8425 inclusive of Remington's Code of the State of Washington against the plaintiff in the above entitled action.

IV.

That said court erred in holding § 8416 of Remington's Code of the State of Washington, relating to the examination of persons desiring to engage in the practice of dentistry in the State of Washington, to be inoperative and of no effect.

V.

That said court erred in holding that § 8416 conferred autocratic and arbitrary powers upon the State Board of Dental Examiners.

VI.

That said court erred in holding that § 8416 was in conflict with the Constitution of the United States and the Fourteenth Amendment thereof.

Wherefore, the appellants pray that said decree be reversed and that said United States District Court for the Western District of Washington, Northern Division, be ordered to enter a decree reversing the decision of the lower court in said cause.

L. L. THOMPSON,
MALCOLM DOUGLAS,
BERT C. ROSS,
Attorneys for Appellants.

63 Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 1, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

64 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity.

No. 233.

LEON NOBLE, Complainant,

v.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Acknowledgment of Service.

We, the undersigned attorneys of record for the complainant in the above entitled action hereby acknowledge due service of the following pleadings on appeal, to-wit:

Petition for Appeal.
Assignments of Error.
Bond of Appeal.
Order Allowing Appeal.
Citation on Appeal.

BROWDER BROWN,
J. W. A. NICHOLS,
Attorneys for Plaintiff.

201 Provident Bldg., Tacoma, Washington.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, July 15, 1921. F. M. Harshberger, Clerk. S. E. Leitch, Deputy.

65 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 233.

LEON NOBLE, Complainant,

vs.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Præcipe.

To the clerk of the above-entitled court:

You will please prepare a transcript of the proceedings in the above entitled matter and include therein the following:

Complaint.
Order to show Cause.
Subpœna.
Answer.
Order continuing hearing on Motion for restraining Order pendente lite.
Temporary Restraining Order.
Stipulation for date of Trial.
Memorandum Decision filed April 15, 1921.
Petition for Re-Hearing.
Memorandum Decision filed June 6, 1921, denying petition for Re-Hearing.
Judgment and Decree.
Petition for Appeal.
Bond on Appeal.
Order allowing Appeal.
Assignments of Error.
66 Acknowledgment of Service.
This Præcipe.

MALCOLM DOUGLAS,
HOWARD A. HANSON,
BERT C. ROSS
Attorneys for Defendants.

Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 15, 1921. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

67 United States District Court, Western District of Washington, Northern Division.

In Equity.

No. 233.

LEON NOBLE, Complainant,

vs.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 66, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by præcipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal herein, from the judgment of said United States District Court for the Western District of Washington to the Supreme Court of the United States.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the Supreme Court of the United States in the above entitled cause, to-wit:

68 Clerk's fees (Sec. 828, R. S. U. S.), for making record, certificate or return, 177 folios at 15c..... 26.55
Certificate of clerk to transcript of record, 4 folios at 15c.... .60
Seal to said certificate ..... .20

I hereby certify that the above cost for preparing and certifying record, amounting to $27.35, has been paid to me by attorneys for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 10th day of August, 1921.

[Seal of the United States District Court, Western District of Washington.]

F. M. HARSHBERGER,
Clerk of United States District Court,
Western District of Washington.

69 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity.

No. 233.

LEON NOBLE, Complainant,

v.

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To Leon Noble, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 1st day of September A. D. 1921, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, from a final decree signed, filed and entered on the 17th day of June, 1921, in that certain suit, being in equity No. 233, wherein you are the plaintiff and Malcolmn Douglas and Bert C. Ross, Prosecuting Attorney and Deputy Prosecuting Attorney for King County are defendants and appellants, to show cause, if any there be, why the decree rendered against the said appellants, as in said order allowing appeal mentioned, should not be corrected and why justice
70 should not be done to the parties in that behalf.

Witness the Honorable —— —— United States District Judge for the Western District of Washington, Northern Division, this 1st day of July, 1921, and of the Independence of the United States the one hundred and forty-fifth.

JEREMIAH NETERER,
United States District Judge for the Western District of Washington, Northern Division.

STATE OF WASHINGTON,
County of King:

We, the undersigned attorneys of record for the plaintiff in the above entitled action, hereby acknowledge due service of the above citation, this 5th day of July A. D. 1921, and enter an appearance for the said plaintiff in the Supreme Court of the United States.

BRONDER BROWN,
J. W. A. NICHOLS,
Attorneys for Plaintiff.

201 Provident Bldg.,
Tacoma, Washington.

71 [Endorsed:] In District Court of the United States for the Western District of Washington, Northern Division. In Equity. Leon Noble, Complainant, v. Malcolm Douglas and Bert C. Ross, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Defendants. Citation on appeal. Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 15, 1921. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy. L. L. Thompson, Malcolm Douglas, Bert C. Ross, Attorneys for Defendants, 431 County-City Building, Seattle, Washington.

Endorsed on cover: File No. 28,453. W. Washington D. C. U. S. Term No. 498. Malcolm Douglas and Bert C. Ross, prosecuting attorney and deputy prosecuting attorney for King County, appellants, vs. Leon Noble. Filed August 31st, 1921. File No. 28,453.

No. 159

In the Supreme Court of the United States

OCTOBER TERM, 1921

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, *Appellants.*

v.

LEON NOBLE, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLANTS.

L. L. THOMPSON,
Attorney General of the State of Washington,

MALCOLM DOUGLAS,
Prosecuting Attorney of King County, Washington,

BERT C. ROSS,
Deputy Prosecuting Attorney of King County, Washington,
Solicitors for Appellants.

Office and Postoffice Address:
Temple of Justice, Olympia, Washington.

THE ARGUS PRESS, SEATTLE

No. 498

In the Supreme Court of the United States

OCTOBER TERM, 1921

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County,
Appellants.

v.

LEON NOBLE,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLANTS.

L. L. THOMPSON,
Attorney General of the State of Washington,
MALCOLM DOUGLAS,
Prosecuting Attorney of King County, Washington,
BERT C. ROSS,
Deputy Prosecuting Attorney of King County, Washington,
Solicitors for Appellants.

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Temple of Justice, Olympia, Washington.

THE ARGUS PRESS, SEATTLE

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No. 498

In the Supreme Court of the United States

OCTOBER TERM, 1921

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County,

Appellants,

v.

LEON NOBLE,

Appellee.

No. 498

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court of the United States for the Western District of Washington, enjoining the prosecuting attorney and deputy prosecuting attorney of King County, Washington, from enforcing the provisions of a statute of Washington regulating

the practice of dentistry in that state (Record, p. 37).

The bill of complaint alleged that the complainant is a reputable dentist, a graduate of the Pacific Dental College, of Portland, Oregon, and that he has been engaged in the practice of that profession since the year 1909 (Record, p. 1). It further alleged that complainant has tried upon three occasions to pass the examination prescribed by the state board of dental examiners of the state of Washington for persons desiring to secure a license to practice dentistry, but that the board each time refused to grant him such a license (Record, p. 3). The bill contained appropriate averments showing that the defendants had caused him to be arrested for practicing without a license and had threatened to continue that action unless he would desist from said practice (Record, p. 2). It likewise alleged that the acts in question under which defendants threatened to proceed were in violation of the Fourteenth Amendment to the Federal Constitution and contained the usual prayer for injunctive relief.

The defendants (1) by answer in lieu of a demurrer challenged the sufficiency of the facts set forth in the bill (Record, p. 6), and (2) denied that the state board of dental examiners had ever arbitrarily refused to grant complainant a license to practice dentistry (Record, p. 8).

The application for a temporary injunction was heard before a circuit judge and two district judges, which judges by unanimous conclusion directed a temporary injunction to issue (Record, p. 29). No formal temporary injunction, however, was ever filed, and subsequently the case came on for final hearing before the district judge. The final hearing was had upon the bill of complaint and the answer, no evidence being taken, at which time a permanent injunction was given perpetually enjoining the enforcement of the act by the defendants (Record, p. 37).

SPECIFICATIONS OF ERROR

It is submitted that the District Court erred in the following particulars:

1. In granting a temporary injunction.

2. In denying defendants' prayer for the dismissal of the bill of complaint.

3. In granting an injunction perpetually enjoining these defendants from enforcing the provisions of Sections 8412 to 8425, inclusive, of Remington's 1915 Code of Washington.

4. In holding that section 8416 of Remington's 1915 Code of Washington relating to the examination of persons desiring to engage in the practice of dentistry in Washington to be void.

5. In holding that said statute conferred autocratic and arbitrary powers upon the state board of dental examiners and that said statute was in conflict with the Constitution of the United States and the Fourteenth Amendment thereto.

ARGUMENT

The foregoing specifications of error in substance involve but one question, to-wit: The constitutionality of Section 8416, Remington's 1915 Code of Washington, and for that reason need not be separately discussed. Section 8412, Rem. 1915 Code, provides for the creation of a board of dental examiners to consist of five practicing dentists. Section 8416, Rem. 1915 Code, provides:

> "Any person or persons seeking to practice dentistry in the state of Washington, or to [own], operate or cause to be operated, [or to run or manage] a dental office or place for the practice of dentistry in the state of Washington after the passage of this act shall file his or her name, together with an application for examination, with the secretary of the state board of dental examiners, and at the time of making such application shall pay to the secretary of the board a fee of twenty-five dollars, and to present him or herself at the first regular meeting thereafter of said board to undergo examination before that body. No person shall be eligible for such an examination unless he or she shall be of good moral character and shall present to said board his or her diploma from some dental college in good standing and shall give satisfactory evidence of his or her rightful

possession of the same: Provided, this section shall not apply to persons engaged in the practice of dentistry at the time of the passage of this act who are bona fide citizens of the state of Washington. All persons successfully passing such examination shall be registered as licensed dentists in the board register as hereinafter provided, and also receive a certificate, said certificate to be signed by the president and secretary of said board and in substantially the following form, to-wit:

"This is to certify that..... is hereby licensed to practice dentistry in the state of Washington. This certificate must be filed for record in the office of the auditor of any county in which the party holding such certificate desires to practice, and it is unlawful for him (or her) to practice dentistry in any county in which said certificate is not filed for record.

"Dated at..... this..... day of....., A. D. 190.....

("President of said board of examiners.)

....., ("Secretary of said board.")

Section 8417, Rem. 1915 Code, provides:

"The certificates in this chapter provided for shall entitle the holder thereof to practice dentistry in any county in the state of

Washington: Provided, such certificate shall first be filed for record in the office of the auditor of the county in which such holder desires to practice, and nothing herein contained shall be construed to permit any holder of any certificate to practice in any county in this state unless such certificate shall have been first recorded in the office of the auditor of such county as herein provided: Provided further, that any such holder of a certificate may practice in more than one or any number of counties in this state on having such certificate recorded in each of such counties in which such holder desires to so practice. Said board of dental examiners shall, upon satisfactory proof of the loss of any certificate issued under the provisions of this chapter, issue a new certificate in place thereof. Any person failing to pass the first examination successfully may demand a second examination at a subsequent meeting of said board, and no fee shall be charged to [for] said examination: Provided, that the second examination is taken before the expiration of one year."

Section 8421, Rem. 1915 Code, provides that any person who shall practice dentistry without having recorded his certificate to practice with the county auditor shall be guilty of a misdemeanor, and upon conviction shall be fined in

any sum not less than $50.00 nor more than $200.00, or be confined in the county jail for a period of not to exceed six months.

The conclusion of the District Court announced in the memorandum decision filed upon the motion for a temporary injunction was made the basis of the final decree, and is premised upon an alleged defect in Section 8416, *supra*, in that the District Court concluded that this section granted arbitrary and unlimited power to the state board of dental examiners because it failed to prescribe any standard which should govern the board in giving these examinations, and likewise failed to expressly prohibit arbitrary or unlawful action by the board. The correctness of this conclusion is the only point involved in the case.

I.

The Construction of the Statute by the State Court

Assuming for the purpose of argument that such a statute, if originally presented to this court for construction, would contravene the Fourteenth Amendment, we submit that as construed by the Supreme Court of Washington, which is the highest court of that state, it is subject to no valid constitutional objection. The act was first considered and sustained by that court in the case of *In Re Thompson*, 36 Wash. 377. In that action the statute was attacked, among

other things, upon the ground that Section 8416, *supra*, conferred arbitrary powers upon the board of dental examiners. This appears quite conclusively from the following excerpts which we have taken from petitioner's brief in the *Thompson* case, a copy of which is on file in the law library of the Supreme Court of the state of Washington, at Olympia, Washington, and to which reference was also made by the appellants in their petition for a re-hearing in the District Court (Record, pp. 31 and 32). For instance, upon page 13 of petitioner's opening brief in the *Thompson* case, the following statement appears:

> "Nothing is said about what they shall be examined in, nor to what extent, nor what the examination shall be, whether physical or otherwise; nor does it say that the examination shall relate to dentistry, or test the qualifications of the applicant to practice dentistry."

Likewise, upon page 15 of that brief the petitioner said:

> "The act does not control and regulate the action of the board. The board in prescribing an examination, to which all must submit, and setting up standards of qualifications, according to its own will and caprice to be enforced or not enforced as they see fit, or in such manner as they see fit, is acting entirely outside the domain of law and

in the realm of the lawless; such action is not warranted by law, and is actually forbidden by the fundamental law of the land."

The same argument was again reiterated upon page 17 of the opening brief and also upon pages 2 and 3 of petitioner's reply brief in the *Thompson* case. While the state court does not expressly state this contention in the language in which it was set forth in the brief, it was apparently considered, because upon page 379 of the decision the court said:

"No power of legislation is conferred by the act upon the dental board, unless it may be said that the rules which the board have adopted, or may adopt, are arbitrary and unauthorized. There is nothing in the record before us to indicate that the dental board have adopted any rules, arbitrary or otherwise, but assuming that the board have adopted some rules—as they certainly must, in order to properly determine the good character of the applicant and the good standing of the college issuing his diploma, and to *conduct the examinations upon subjects reasonably required in that profession* —we must assume in this proceeding that such rules are reasonable *and within the scope and purview of the act.* That the board may adopt unreasonable, unwarranted, or purely arbitrary rules for the exam-

> ination of applicants cannot be presumed to defeat the act. Unless the act itself is void, arbitrary or void rules, *made without authority of the act*, cannot render it so. The remedy of petitioner for an *abuse of the powers* of the dental board is not an attack upon the act creating the board, *but must be found in some appropriate proceeding to review the conduct of the board.*" (Italics ours.)

The learned District Court discusses this portion of the opinion of the state Supreme Court in the following language (Record, p. 16):

> "The court evidently assumed that the board had adopted such rules and that they were reasonable rules, and, inferentially, that they had followed such rules; and further that they could be depended upon to continue to do so. This appears to us to be a non-sequitor."

This conclusion of the District Court, it would seem fails to notice the statement of the Washington court that in the absence of evidence to the contrary it will assume any rules which have been promulgated to be reasonable "*and within the scope and purview of the act.*" It likewise overlooks the further statement of the state court that rules made "*without authority of the act*" cannot render the act itself void. It likewise overlooks the statement that, in the absence

of a showing to the contrary, it will assume that if any rules have been adopted, such rules provided for examination upon subjects reasonably required in that profession. The same construction was later announced in the case of *State ex rel. Brown v. State Board of Dental Examiners*, 38 Wash. 325. In that case the court refused to sit as an appellate tribunal to re-examine the action of the board in refusing to pass an applicant for a license to practice dentistry, and we think properly so under the decision of this court in *Reetz v. Michigan*, 188 U. S. 505. At the same time, however, it made the following observation with respect to the powers and duties of this board (Op., p. 328):

> "But, notwithstanding this, it is equally well established that courts will compel by mandamus the honest performance of official duty, and, if, under pretense of exercising discretion, the power is exercised with manifest injustice or is grossly abused, or duty is avoided, the courts will grant relief. The action of the court must, in reality, be based upon the assumption that the inferior tribunal has refused to exercise the discretion with which it is clothed; because, if it acts arbitrarily or fraudulently, or through unworthy or selfish motives, or conspires against the rights of individuals, under the law, and therefore against the law itself,

> it has not strictly, as is frequently said, 'abused its discretion'—a term which is responsible for some confusion of ideas on this subject—but in contemplation of law, it has not exercised its discretion at all, but has sought to substitute arbitrary and fraudulent disposition and determination of the question submitted, for the honest discretion demanded by the law. In such cases the law will, by mandamus, compel the tribunal to act honestly and fairly, or, in other words, *to exercise its discretion;* and, when this distinction is kept in mind, the seeming difficulties which have surrounded this question, and which have caused so much discussion, disappear."

We interpret the language of these two decisions to mean that examinations held under this statute are required to be restricted to those matters which have some relation to the qualifications of an applicant seeking a license to practice the profession of dentistry in the state. If such be the proper interpretation, then there can be no doubt upon the main question under the authority of *Dent v. West Virginia*, 129 U. S. 124. In the *Dent* case this court sustained a statute of Virginia which prohibited the practice of medicine and surgery unless the practitioner possess a license. Licenses were required to be issued by the state board of health.

Under the terms of the act graduates of certain medical colleges and persons who had practiced the profession for ten years were licensed to practice without examination. All other persons were examined by the state board of health and an applicant was only entitled to a license from the board if "upon full examination they find him qualified to practice medicine in all of its departments." The statute, as does the one at bar, prescribed no specific standard for the board to follow; neither did it in express terms prohibit arbitrary action by the board. The only direction was that the board should find the applicant qualified to practice medicine. This statute was held not to be inconsistent with any provision of the Fourteenth Amendment to the National Constitution.

Whatever may be the proper construction of the Washington statute as an original proposition, the decision of the Washington Supreme Court in the *Thompson* and *Brown* cases, *supra*, gives to that act a meaning which, if it be accepted, renders that statute and the West Virginia act, sustained in the *Dent* case, incapable of differentiation. It is, of course, unnecessary to do more than cite some of the decisions of this court in which it has been held that the construction affixed to a state statute as to a state matter by a court of last resort of a state is binding upon the Federal courts.

Quong Ham Wah Co. v. Industrial Accident Commission, 255 U. S., 445; 41 Sup. Ct. Rep. 373, and cases cited therein.

II.

The Act Does Not Delegate Arbitrary Power or Authorize Unconstitutional Action

Assuming, however, that this court shall undertake to itself construe this statute without respect to the decisions of the Washington court, it is submitted that the statute when so considered is free from valid objection. Section 8412, Rem. 1915 Code, provides that the members of the state board of dental examiners must be practicing dentists. This section therefore necessarily presupposes that the duties of the board shall be such as will make professional knowledge necessary to the successful performance of those duties. The only duty which the board has is the duty under Section 8416, *supra*, to examine applicants and issue certificates to practice. These examinations, however, under the provisions of the same section, can only be given graduates of dental colleges of good standing. If the intent of the statute was to vest in the board unlimited and arbitrary power, an intent expressly denied in the *Thompson* case, *supra*, it is difficult to see why the state legislature required the members of the board to be practicing dentists or why it required applicants to present evidence of

graduation from a reputable dental school. The only reasonable explanation which we can find for the two provisions is to construe the statute as providing for examination upon matters calculated to test the applicants' professional knowledge of dentistry. If that construction be adopted, then the reason why board members were required to be dentists and applicants to be graduates of dental schools becomes at once apparent. Again, Section 8416, *supra*, provides for the *examination* of such applicants. The word "examination," as applied to professions, is defined in Webster's International Dictionary as follows:

> "A process prescribed or assigned for testing qualifications; as, the examination of a student or of a candidate for admission to the bar or the ministry."

We find it difficult to square this definition with the statement of the learned District Court that "in fact, the letter of the statute does not even command or direct that the examination shall relate to his qualifications to practice dentistry." (Record, p. 20). The command of the statute is that the applicant, upon payment of a fee, shall be examined, or, paraphrasing the language of the definition above quoted, that his qualifications to practice dentistry shall be tested by the board, and whenever they are made to appear, the certificate to practice shall issue. An examination upon subjects not related to the profession, such

as the District Court suggested would be possible under the act, would not be an examination either in fact or under the statute. We also add that we have found no decision of the Supreme Court of Washington which denies the judicial power of the courts of Washington to enforce compliance with the mandate of the statute in proper cases, and indeed, in *State ex rel. Brown v. State Board of Dental Examiners, supra*, the power of the court to act in such cases was affirmed.

It is submitted that this statute, when liberally construed, in no wise differs from the act considered in *Dent v. West Virginia, supra*, and that upon the authority of that case it should be sustained.

III.

The Fourteenth Amendment Does Not Require Express Legislative Prohibition of Arbitrary Action by State Administrative Officers in Statutes Vesting Administrative Powers in Such Officers

For the purpose of considering this point, we shall temporarily assume the fallacy of the points heretofore advanced, that is to say, we shall assume (1) that the statute has never been construed by the state court insofar as this question is concerned, and (2) that when construed by this court it should be held as lacking in any express prohibition of arbitrary action by the

state board of dental examiners. In this connection we must at all times recollect that the case does not involve any particular alleged arbitrary action by the board. This was alleged in the bill by general conclusion, and was denied by the defendants but no proof was submitted, the District Court being of the opinion that the statute was void upon its face without regard to the question of whether, in fact, the board had acted arbitrarily. We quote from the memorandum decision of the District Court:

> "The case is not one of the board's abuse of powers lawfully conferred; but the abuse and wrong consist in undertaking to confer unlimited powers" (Record, p. 21).

It was the contention of the appellee, and also the view of the District Court that where the right of a citizen to pursue an occupation might under the police power and subject to certain limitations be made dependent upon the permission of an administrative officer, then that statute must prohibit arbitrary action by that officer either by a definition of the officer's jurisdiction or by express words of prohibition, and that if it fail so to do, it should be held void upon its face. It was the contention of the appellant that where the right to follow an occupation is under some circumstances subject to the police power, then the issuance of permits to pursue that occupation may, in general terms, be entrusted to an

administrative officer without express words of prohibition or arbitrary action, since the courts are bound to presume the regularity of administrative action until the contrary is made to appear, in which event persons adversely affected will be afforded judicial relief. This contention however, is subject to one exception which is illustrated by the decision of this court in *Yick Wo v. Hopkins*, 118 U. S. 356. That exception is that where it is made to appear to the court that administrative officers and state courts have generally construed and enforced a state law in such a way as to violate the National Constitution, then that law will be adjudged invalid upon its face, even though a contrary conclusion might have been reached had the statute originally been presented to the Federal Court for constitutional investigation without any showing of arbitrary construction or action by local authorities thereunder.

We shall consider this question principally from the standpoint of precedent, for the reason that we believe the point to be already covered by several well considered decisions of this court. The District Court cited but two decisions of this court in favor of its conclusion, the opinion being largely premised upon various state decisions. Those two decisions were *Dobbins v. Los Angeles*, 195 U. S. 223, and *Yick Wo v. Hopkins*, 118 U. S. 356. We are unable to perceive the application

of the *Dobbins* case, *supra*. That case merely held that a city could not arbitrarily prevent the construction of a gas works within its corporate limits where the public welfare would admittedly not be subserved by such a prohibition. The case in no way involved the general exercise of delegated powers by an administrative officer, but merely the alleged arbitrary action of a legislative body in seeking to exercise the police power over a subject not properly subject to that power. Since the opinion of the District Court concedes that the case at bar does not involve the "abuse of powers lawfully conferred," then irrelevance of the *Dobbins* case is at once apparent.

The case of *Yick Wo v. Hopkins*, 118 U. S. 356, is of more seeming materiality, but when rightly understood is clearly distinguishable. That case involved the validity of a municipal ordinance of the city and county of San Francisco which prohibited the operation of laundries located in wooden buildings in said city and county unless a permit be first obtained from the board of supervisors. While the ordinance did not, in terms, discriminate against members of the Chinese race, it was shown by competent testimony that over two hundred Chinese had petitioned for permits, all of which had been refused, whereas over eighty persons of other races whose business was exactly analogous had been allowed to do business. The ordinance was attacked upon grounds

stated in the opinion of the court as follows (Op., p. 369):

> "It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face, as being within the prohibitions of the Fourteenth Amendment, and, *in the alternative*, if not so, that they are void by reason of their administration operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances; an unjust and illegal discrimination, it is claimed, which, though not made expressly, by the ordinances, is made possible by them." (Italics ours.)

It will be observed that the petitioners in that case not only made the contention that the act was void upon its face, but that they also contended in the alternative that however innocent the ordinance might have been in its inception it had since become invalid by state administrative and judicial construction. The case was decided by this court and the ordinance held invalid under the latter alternative and the court did not pass upon the question of whether it would have held the ordinance void if there had been no showing of continued arbitrary action thereunder. We quote from that portion of the de-

cision where the court, after quoting at length from a decision of the court of appeals of Maryland, said (Op. p. 373):

> "* * * In the present cases, we are not obliged to reason from the probable to the actual and *pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration.* For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *Though the law itself be fair on its face and impartial in appearance*, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and

> illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Italics ours.)

This quotation conclusively shows that the basis of the decision of the *Yick Wo* case was the illegal construction and enforcement of the ordinance by state administrative and judicial authorities and not the fact that the ordinance failed to expressly prohibit arbitrary action. To illustrate: If the state board of dental examiners had construed this law as permitting them to prohibit the licensing of persons under the age of thirty years, and this construction had been sustained by the courts of Washington, then the *Yick Wo* case would be applicable. We have already shown, however, that there is no evidence of favoritism or partiality produced against the board in the present action. The distinction between the two cases, therefore, is so self evident as to make further discussion superfluous.

We consider now a few instances in which this court has had occasion to consider the validity of such a statute where there is no showing of arbitrary action either by state judicial construction or administrative application and enforcement. The most analogous case upon the subject is *State ex rel. Lieberman v. Van De Carr*, 199 U. S. 552. That case involved the validity of

Section 66 of the sanitary code of New York City, which provided:

> "No milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the board of health, and subject to the conditions thereof."

As far as we can ascertain from an examination of the reported case, this ordinance failed to expressly establish any standard for the guidance of the city board of health, nor did it expressly prohibit arbitrary action by that board. It was affirmed by the court of appeals of New York in *People ex rel. Lieberman v. Van De Carr*, 175 N. Y. 440. This decision does not construe the ordinance as establishing any standard, nor as itself prohibiting arbitrary action by the board. The court did, however, indicate that if it should thereafter be made to appear to the court that the board had acted arbitrarily, then the court would have power to act. With this state judicial construction announced the ordinance came before this court in *State ex rel. Lieberman v. Van De Carr*, 199 U. S. 552. The court will immediately observe the analogy between the two cases. The sanitary code of New York prohibited persons from engaging in the occupation of selling milk, an occupation, to follow which, a citizen ordinarily has a constitutional right except upon conditions to be pre-

scribed by an administrative board. The dental act prohibits persons from engaging in the practice of the profession of dentistry except they successfully pass an examination to be given by a similar administrative board. The New York ordinance was, to a larger extent, lacking in any express legislative standard than is the Washington act because the phraseology of the sanitary code indicated in no manner the scope of the conditions to be imposed by the city board of health, whereas we have already shown that the word "examination" in the Washington act impliedly, if not expressly, confines the board of dental examiners to the testing of the professional qualifications of applicants.

The New York court made no express findings upon the question of whether this ordinance permitted arbitrary action, but merely observed that injunction would not lie because it did not appear that the board of health had acted arbitrarily and that in the absence of such a showing regularity of action by that board would be presumed by the court. The Washington Supreme Court in the *Thompson* and *Brown* cases, *supra*, construed this statute to authorize examinations upon subjects reasonably calculated to test the qualifications of the applicant to practice dentistry. Furthermore, in the *Brown* case, it expressly held that arbitrary or fraudulent action by the board would be subject to judicial review in a proper

case. In affirming the decision of the New York court of appeals, this court, after quoting from a portion of the New York decision in which that court had apparently recognized the absence of any express prohibitory words in the ordinance but had also affirmed its own power to protect the constitutional rights of citizens, said (Op. p. 560):

> "We do not think that this language leaves any question as to the disposition of the highest court of New York to prevent the oppression of the citizen or the deprivation of his rights, by an arbitrary and oppressive exercise of the power conferred. That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people, there can be no doubt."

The view of the district court is squarely opposed to the doctrine announced in the *Lieberman* case. That view is tersely stated in the memorandum opinion in the following language (Record, p. 21):

> "The case is not one of the board's abuse of powers lawfully conferred; but the abuse

and wrong consist in undertaking to confer unlimited powers."

This view fails to distinguish between a statute which in affirmative language directs a public officer to perform an unconstitutional act and one which directs him to follow a general lawful course of conduct without expressly prohibiting arbitrary action. In the first case the statute will be adjudged invalid upon its face because there is nothing upon which it may legally operate. In the second, the statute stands because arbitrary action is not presumed, but where an officer seeks to act illegally thereunder, his individual action will be restrained.

The *Lieberman* case cites with express approval the cases of *Davis v. Massachusetts*, 167 U. S. 43, and *Wilson v. Eureka City*, 173 U. S. 32. In the *Davis* case an ordinance of the city of Boston providing that no person might make a public address upon the public grounds of the city without first obtaining a permit from the mayor was held not to be in conflict with the Fourteenth Amendment, although no express limitations were imposed upon the mayor in the matter of issuing permits and the contention was made that the ordinance was invalid because it sought to vest unlimited power in that officer.

In *Wilson v. Eureka City*, a municipal ordinance which vested in a city officer unlimited discretion in the matter of issuing permits to

move buildings upon the city streets was attacked "because the ordinance commits the rights of plaintiff in error to the unrestrained discretion of a single individual, and thereby, it is claimed, removes them from the domain of law." Upon the authority of *Davis v. Massachusetts* this ordinance was by this court sustained.

The *Lieberman* case was also cited with express approval in *Engel v. O'Malley*, 219 U. S. 128. That case involved the validity of a statute of New York which provided that no person might engage in the business of banking unless he first secure a permit from the comptroller of banking, of that state. The act did not specifically designate the considerations which should guide the comptroller in passing upon a given application, and neither did it in express terms forbid arbitrary action upon his part. The official report of the case shows the following contention to have been made by appellant (Op. p. 129):

> "The statute is unconstitutional because it gives the comptroller arbitrary power to deprive appellant of his right to carry on his business."

This contention was answered by the court when, after suggesting that possibly there was some standard established, it said (Op. p. 137):

> "But the nature and extent of the remedy, if any, for a breach of duty on his part, we think it unnecessary to consider; for the

power of the state to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the requirement may be attached."

The same thought was emphasized in *Hall v. Geiger-Jones Co.*, 242 U. S. 539, although the case is to some extent distinguishable upon the facts. That statute involved the statute of Ohio which prohibited the sale of securities except a permit be first obtained from the state public service commission. The only standard established for the guidance of the commission was the requirement that before it issued a permit it should "be satisfied of the good repute in business of such applicant." It was contended that this, in effect, established no standard "to guide or determine the decision of the commissioners." After suggesting that repute in business seemed to be a sufficiently tangible attribute, this court apparently in the alternative, further observed (Op. p. 554):

"The discretion of the commissioner is qualified by his duty, and besides, as we have seen, the statute gives judicial review of his action. *Pending such review, we must accord to the commissioner a proper sense of duty and the presumption that the functions intrusted to him will be executed in the*

public interest, not wantonly or arbitrarily to deny a license to or take one away from a reputable dealer. * * *; and, as we have said, in cases where there can be a dispute of fact, the statute provides for judicial review, and we see no legal objection to the designation of a particular court for such review." (Italics ours.)

While the dental law does not expressly give any judicial review of the action of the board, the Supreme Court of the state in the *Brown* case, *supra*, has held that jurisdiction to exist where arbitrary action appears. In so far as persons affected by the act are concerned, therefore, the result here is the same as in the *Geiger-Jones* case. It obviously makes no difference in so far as the Fourteenth Amendment is concerned whether a person's constitutional rights are protected by state courts pursuant to the command of a specific statute in a particular case, or by judicial action based upon the general powers of the local courts. The silence of a state statute with respect to judicial review, when accompanied by a state judicial exercise of jurisdiction, is the constitutional equivalent of express statute created jurisdiction.

Even if the question be considered purely from the standpoint of principle, it seems to us self-evident that these decisions are sound. The Fourteenth Amendment prohibits the taking by

a state of life, liberty or property without due process of law, and likewise the denial to any person of the equal protection of the law. The courts, both state and Federal, are the instruments created by our form of government to enforce this constitutional command. It will be conceded that the public welfare may not only justify, but require, the prohibition of the practice of dentistry by certain persons, dependent upon the existence of particular facts such as the professional qualifications or the physical health of a would-be practitioner. It must also be conceded that the ascertainment of those facts, involving as it often does, technical professional matters with which the courts are necessarily unacquainted, may be properly entrusted to administrative officers. In such event the only constitutional right which an interested person may have is the right to be protected from arbitrary action by such administrative officers. *Reetz v. Michigan*, 188 U. S., 505. If he is afforded that protection by the state courts, in what way can he be injuriously affected by the fact that those courts failed to find express authority to act in the particular statute which prescribes generally the powers and duties of the administrative officer. We submit that it is sufficient that his rights are preserved by state judicial authority and if they are so protected, what occasion or necessity is there for the intervention of a Federal court of equity. Federal

courts quite properly are hesitant to stay the hand of a state officer, and will not do so except for substantial cause. The conclusion of the Supreme Court of Washington in the *Brown* case, *supra*, that it had not only the power, but the duty, to prevent arbitrary action under this statute must be taken as a substantial equivalent of a holding that the statute did not authorize arbitrary action since that statute was at the same time sustained. In so far as the Fourteenth Amendment is concerned, what substantial difference is there between a statute which does not authorize unconstitutional action and one which prohibits that action where the state courts are ready and willing to protect all constitutional rights if threatened thereunder? The same result is obtained in both instances, the only difference being that in the one case the National Constitution is observed by a negative action, and in the other by an affirmative declaration. The Fourteenth Amendment, we submit, was designed to govern the affirmative actions of state legislative bodies, and was not intended to so operate as to require every legislature whenever it acts under the police power to expressly direct its law enforcement officers not to violate the National Constitution. It is true that when the negative action of the legislature is by state administrative and judicial construction and enforcement found to authorize unconstitutional acts, then a Federal

court will restrain its enforcement. *Yick Wo v. Hopkins*, 118 U. S. 356. This is not upon the theory, however, that it is the duty of a state legislature, whenever it enacts a statute, to anticipate unlawful action upon the part of state officers and courts and to prohibit that action by express language, but is rather premised upon the fact that state judicial and administrative construction have construed a statute, originally innocuous and proper upon its face, as constituting an affirmative authorization to state officers to violate the Federal Constitution. In such event the statute by construction thus passes into the category of cases where the legislature has attempted to do an unlawful thing, and of course will be held void.

The case at bar is entirely lacking in the features presented to this court in the *Hopkins* case, *supra*, and is, we submit, governed by the other line of cases to which we have already referred.

RECAPITULATION

1. This statute as construed by the Supreme Court of Washington in *In Re Thompson*, 36 Wash. 377, and *State ex rel. Brown v. Board of Dental Examiners*, 38 Wash. 325, requires these examinations to be restricted to those matters which are pertinent to the practice of dentistry and is therefore valid under the authority of *Dent v. West Virginia*, 129 U. S. 124.

2. This statute, even if subject to original

construction by this court, provides for examinations analogous to those provided for in *Dent v. West Virginia, supra*, and upon the authority of that case is valid.

3. The Fourteenth Amendment does not require express prohibition of arbitrary action by administrative officers, and a failure to incorporate such a prohibition in a state statute will not invalidate that statute unless it appears that state courts and administrative officers have generally construed the statute to permit arbitrary action. Since the record is silent as to administrative construction and the judicial construction of the courts of Washington interprets the statute to prohibit arbitrary action, it will be presumed that the administrative officers will follow the judicial view, in which event the act is not subject to sound constitutional objection.

The judgment of the District Court was erroneous and should be reversed.

Respectfully submitted,

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No. 159

In the Supreme Court of the United States

OCTOBER TERM, 1922

MALCOM DOUGLAS *and* BERT C. ROSS,
Prosecuting Attorney and Deputy Prosecuting Attorney for King County,

Appellants,

vs.

LEON NOBEL,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE

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No. 498

In the Supreme Court of the United States

OCTOBER TERM, 1922

MALCOM DOUGLAS *and* BERT C. ROSS,
Prosecuting Attorney and Deputy Prosecuting Attorney for King County,

Appellants,

vs.

LEON NOBEL,

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

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No. 498

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No. 498

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE

STATEMENT OF THE CASE

We concede the correctness of counsel's opening statement in their argument,—that their specifications of error involve but one question, to-wit: the constitutionality of Section 8416 of Remington's 1915 Code.

The District Court held such to be the question

at issue, and based its decision on the unlimited authority conferred or attempted to be conferred on the board in the examinations for licenses; and finding such authority to be without limit, rule or regulation of any kind or degree as to such examinations, held the statute so far as it relates to examinations to be inoperative and void (Record p. 29).

Examination of the statute, quoted by appellants on Pages 4 and 5 of their brief, will disclose the correctness of the District Court's conclusion as to absence of limitations on the power of the Board. Analysis of the statute is best given by quoting from the Court's opinion:—274 Fed. Rep. 672-679 (Record p. 20):

> "There is no regulation in the statute under consideration concerning the subjects upon which the applicants shall be examined; no regulation as to percentages required to pass examination; no regulation as to whether the examination shall be confined to the theory of dentistry; whether written or oral; or whether the applicants proficiency shall be determined by requiring him to demonstrate his skill with the tools and materials of his profession, or whether the examination may include both methods. In fact the letter of the statute does not even command or direct that the examination shall relate to his qualifications to practice dentistry. There

> is no requirement even that the board shall find the applicant competent and qualified in all or any subjects related to his profession, and for that matter, no requirement that they shall find him qualified as to subjects correlated as unrelated to his profession. No tests for the determination of his fitness, either appropriate or inappropriate. No provision is made for the keeping of any records, either records made by the board or made in the process of examination by the applicant; neither a record for the purpose of review in case of dissatisfaction or complaint, nor as a precedent and guide for future examinations."

And we may add that if further limitations or directions as to the examinations can be suggested, the statute lacks them also.

The Dent Case

Counsel seem to rely largely on the Dent Case (129 U. S. 124) for support of their contention. We suggest with regard to that case:

(1) That the question here in issue, viz: the granting of arbitrary power in examinations, was not raised, discussed, decided nor even mentioned in that case; and (2) that, contrary to counsel's statement, the law of West Virginia was not like the Washington statute,—wholly lacking in regu-

lations and limitations on the powers of the board in matter of examinations, but did contain numerous limitations and regulations in that matter as the following quotation from the law shows, to-wit:

> "Examinations may be made in whole or in part in writing and shall be of an elementary and practical character, and shall embrace the general subjects of anatomy, physiology, chemistry, materia medica, pathology, pathological anatomy, surgery, and obstetrics, but sufficiently strict to test the qualifications of the candidate as a practitioner of medicine, surgery and obstetrics. The provisions of this chapter shall not apply to females practicing midwifery." Laws of West Virginia, 1882, Chap. 93, Paragraph 12.

In view of the above language, we submit that counsel's repeated statements that the statute upon which the Dent case was founded is analogous to our statute is not warranted. But in any event, the only matters in issue in that case were the reputable character of the college from which the defendant had his diploma, and his right to practice because of six years residence in the state instead of the ten years prescribed. These differnces between the Dent case and this case, both in the matter of the statutes involved, and

the issues tendered, show why the District Court could not consider the Dent case as an authority in this case (Record p. 17).

The Yick Wo Case

Counsel seek to evade the force and effect of the case of *Yick Wo vs. Hopkins*, 118 U. S. 356, by quoting after the manner of Satan quoting scripture,—by omitting the pertinent parts. The quotation given means only that this Court would have felt bound to release the petitioners, because of the unlawful and arbitrary manner in which the ordinances in question had been administered, even though the law itself be (were) fair on its face. That such is the true meaning is apparent from the context,—The Court's quotation and approval of the opinion of Circuit Judge Sawyer; and more directly by the express words of this Court by Justice Matthews where he says:

> "For the determination of the question whether the proceedings under these ordinances and in the enforcement of them, are in conflict with the constitution and laws of the United States, necessarily involves the meaning of the ordinances, which for that purpose we are required to ascertain and adjudge."

So that by this specific declaration of the Court, the decision was based, not as counsel argues, upon the unlawful acts of the officers alone, but upon the character of the ordinance under which they acted. Their acts were not in violation of any of the terms of the ordinance. That perhaps would have been a matter for the State Courts; but their acts were unlawful because the ordinance itself by permitting such acts, was repugnant to the Federal Constitution; that was the question,—the meaning of the ordinances,—which the Court felt itself called upon "to ascertain and adjudge."

The Thompson Case

Counsel cite the decisions of the Washington Supreme Court in the cases of In Re *Thompson* 36 Wash. 377, and *State ex rel. Brown vs. State Board of Dental Examiners*, 38 Wash. 325, under the rule that the construction of a state statute by the highest Court of the state, will be accepted and followed by this Court. We find no fault with the rule. We affirm, however, that neither in the Thompson case nor in the Brown case, nor in any other case has the Supreme Court of Washington *construed* the dental statute.

The Court did say in both of those cases and in other cases that the dental law is not repugnant to the Federal constitution. But so did the Supreme Court of California in the *Yick Wo* case say that the ordinances there in question were not repugnant to the Federal constitution and cited decisions of this Court in support of their "construction." But this Court quite evidently did not consider the mere declaration that the ordinances were not repugnant to the Federal constitution as a "construction" of the ordinances; for this Court after referring to the California Court's declaration, says:

> "We are consequently constrained at the outset to differ from the Supreme Court of California upon the real meaning of the ordinances in question."

We submit that to construe a statute is to define its terms, or resolve an ambiguity; or, as Webster gives it, to construe is to translate; interpret; explain. And we venture to add as a negative proposition that to construe is not to contradict. To declare a meaning, therefore, which the language of a statute will not warrant, is not a construction of the statute.

If the California Court's declaration that their ordinances were not repugnant to the Federal constitution had been considered by this Court as a construction of the ordinances, of course the rule would have governed and the appeals have been dismissed. So in the cases of the Washington Court in the dental cases. Not in any instance does the Washington Court attempt to define the terms of the statute or remove any ambiguity, or in any manner to translate, or interpret or explain. Instead of attempting to construe the statute, the Court's references thereto are in general language only, which wholly fails of definite application. This is apparent by inspection of the quotations given by counsel in their brief on Pages 11 and 12 where it is stated that "it is equally well established that Courts will compel by mandamus the honest performance of official duty." With this general statement we fully agree; but how can the Court compel performance of a duty that is not prescribed? Will the Court determine the duty and so read into the law something which the legislature had omitted; and so, as often as a question is presented in a new case, read in some new provision? Then in the quotation given, the Court speaks, again in general terms, of the

relief that will be given by the courts if the board shall exercise its discretion with manifest injustice. But discretion means the exercise of given powers within given limits; if there are no limits there can be no discretion. Then the Court speaks of the results if the board shall act arbitrarily, or shall conspire against the rights of individuals. But to act arbitrarily is not, necessarily, to act viciously. To act arbitrarily is simply to act without rule or guide or regulation, and where, as here, no rule or guide or regulation is given, the only action that can be taken is "arbitrary" action. And as to conspiring against the rights of individuals, how can that be where there are no rights defined? Or will the Court deny to the board the exercise of arbitrary powers and determination of rights, and arrogate to itself those functions, which the legislature has attempted to confer on the board. In either case is it not manifest that such action, as said by the District Court in this case, would be the administration of government by men and not by law (Record p. 21).

We submit that the mere decision of a State Court that the state statute is not violative of the Federal constitution is not a "construction" of the

statue, binding on this Court within the rule; otherwise no appeal or writ of error from a State Court on the validity of a state statute would lie. And if this is so, it follows that counsels' argument on the construction of the dental law by the state Court is without foundation.

Prohibiting Arbitrary Power

Counsel state on page 7 of their brief that the District Court concluded that Section 8416 of the dental law granted arbitrary and unlimited power, because it failed to prescribe any standard which should govern the board in giving examinations, "and likewise failed to expressly prohibit arbitrary or unlawful action by the board."

Just what is meant by this last clause we are at a loss to know. But as that, or equivalent expressions, are used eleven times in the course of the brief, it would seem to require some attention.

But first, then, we find no expression in the District Court's opinion in anywise indicating that the conclusion of the grant of arbitrary power was in any manner or in any degree based upon the fact that the stattue "failed to expressly prohibit arbitrary or unlawful action by the board." We have never had our attention called to a Court de-

cision that held a statute void because it failed to expressly prohibit arbitrary action; and we have never had our attention called to a statute or ordinance that did "expressly prohibit arbitrary or unlawful action." And if we may venture an opinion we would say that any statute or section of a statute that should "expressly prohibit arbitrary or unlawful action" would to that extent be while we admit, as stated in Page 17 of the brief, held void for uncertainty of meaning. And so that "it was the contention of appellee * * * that the statute must prohibit arbitrary action * * * by a definition of the officers jurisdiction," we plead not guilty to the charge of contending that the statute must prohibit arbitrary action "by express words of prohibition."

And so we offer an amendment to the caption of counsel's third division of their brief on Page 16, so that the same shall read: "The Fourteenth Amendment does not require express Legislative Prohibition of Arbitrary Action by State Administrative Officers, In statutes Vesting Administrative Powers in Such Officers, *in order to make such statutes conflict therewith.*"

The Lieberman Case

Appellees seem to place their main reliance, however, on their exposition of the *Lieberman* case, 199 U. S. 552, even referring thereto as "the most analogous case upon the subject," (Brief p. 22), and remarking that "the court will immediately observe the analogy between the two cases" (Brief p. 23).

As we read the *Lieberman* case, however, there appears no analogy whatever between that case and ours. We invite the Court's attention to some features of that case which seem to us to preclude any thought of analogy between the two cases.

In the first place, the only part of the New York Sanitary Code set out, is the section 66, which provides that no person shall sell milk without a permit. There is no showing as to what conditions or regulations were required for obtaining the permit, nor that conditions and regulations were omitted from the sanitary code so as to leave the granting of the permit to the mere will of the commission. No complaint was made in the Lieberman case as to the character of any conditions or regulations for the granting of the

permit, nor as to the absence of such conditions or regulations. The complaint seems to have been based upon the assumption that the Commission, having the power to grant permits, would act arbitrarily whether there were regulations or not.

But in the second place there is a still wider difference between the two cases. Going back to the report of the decision of the New York Court of Appeals, 175 N. Y. 440, we find that the sanitary code complained of did contain numerous detailed regulations governing the granting of such permits. Referring to the provisions of the code, the Court says:

> "It contains about 50 sections, among others, providing for the issuing of permits regulating the conduct of business and vending of food. It has at least 10 sections regulating, among other things, the quality of milk to be offered to the citizens and the details involved in the sale thereof."

The total absence from the Washington dental code of any regulation or restriction whatever regarding the examination of applicants, either as to matter, manner, extent, subjects, uniformity, records, or any other feature, at once differentiates it from the sanitary code referred to in the *Lieberman* case.

Conclusion

The record in this case shows that power without limitations is attempted to be given to the dental board in the examination of applicants for licenses to practice dentistry. No case has been called to our attention where similar grant of power has been upheld by this court. The *Yick Wo* case is an example of the many decisions of this Court where such attemtped grant of power has been denied. The District Court in this case in its decision reported in the Federal Reporter Vol. 274, p. 672, has followed the decisions of this Court, and we submit it in full harmony therewith and should be affirmed.

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DOUGLAS, PROSECUTING ATTORNEY FOR KING COUNTY, ET AL. *v.* NOBLE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 159. Argued January 2, 1923.—Decided February 19, 1923.

1. The law of Washington, Remington, 1915, §§ 8412–8425, which provides that only licensed persons shall practice dentistry, vesting the licensing power in an examining board of practicing dentists and declaring that every person of good moral character with a diploma from a reputable dental college shall be eligible and shall have a license if he passes examination, is not to be construed as vesting power in the board to grant or withhold licenses arbitrarily. P. 167.
2. The statute indicates clearly, though not in terms, the general standard of fitness, and the character of examination required, leaving to the board to determine (1) what knowledge and skill fit one to practice dentistry, and (2) whether the applicant possesses them. P. 169.
3. Delegation of these functions to a board is consistent with the Federal Constitution. P. 170.

274 Fed. 672, reversed.

APPEAL from a decree of the District Court permanently enjoining the appellants, two prosecuting attorneys, from proceeding criminally against the appellee for practicing dentistry without a license.

Mr. Malcolm Douglas, with whom *Mr. L. L. Thompson*, Attorney General of the State of Washington, and *Mr. Bert C. Ross* were on the brief, for appellants.

Mr. Cassius E. Gates, for appellee, submitted. *Mr. Browder Brown* and *Mr. J. W. A. Nichols* were also on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In 1893 the legislature of Washington provided that only licensed persons should practice dentistry. It vested the authority to license in a board of examiners, consisting of five practicing dentists; and it required that persons desiring to practice should apply to that board and undergo examination before it. Every person of good moral character with a diploma from a reputable dental college was declared eligible; and, if he or she passed the examination, became entitled to a license. Laws of Washington, 1893, c. 55. That statute, with amendments not here material, Laws of 1901, c. 152, has since been continuously in force. It is now embodied in Remington's 1915 Codes and Statutes of Washington, § 8412—§ 8425. The validity of the statute has been attacked on various grounds; and it has been repeatedly upheld by the highest court of the State.[1]

In 1921 Noble brought this suit in the federal court for the Western District of Washington to enjoin the King County prosecuting attorney from proceeding criminally against him for practicing dentistry without a license. Jurisdiction of that court was invoked solely on the ground that rights guaranteed plaintiff by the Federal Constitution were being invaded. The bill charged that these were violated, both because the licensing statute was void and because the board in administering it had exercised its power arbitrarily. The case was heard by three judges upon application for an interlocutory injunction

[1] *State ex rel. Smith* v. *Board of Dental Examiners*, 31 Wash. 492; *In re Thompson*, 36 Wash. 377, 379; *State ex rel. Brown* v. *Board of Dental Examiners*, 38 Wash. 325; *State* v. *Littooy*, 37 Wash. 693; *State ex rel. Thompson* v. *State Board of Dental Examiners*, 48 Wash. 291; *State* v. *Littooy*, 52 Wash. 87; *Brown* v. *State*, 59 Wash. 195. See also *State* v. *Brown*, 37 Wash. 97.

under § 266 of the Judicial Code. It was admitted that plaintiff was of good moral character; that he had a diploma from a reputable dental college; that he had submitted himself to the dental board for examination; that he had been examined, but had not passed the examination; and that, although refused a license, he had persisted in practicing dentistry. The board denied, by its answer, that it had acted arbitrarily in refusing a license; and this charge does not appear to have been further insisted upon.

Plaintiff rested his case solely on the claim that the statute violated the Federal Constitution. It was conceded that a State may, consistently with the Fourteenth Amendment, prescribe that only persons possessing the reasonably necessary qualifications shall practice dentistry, *Dent* v. *West Virginia*, 129 U. S. 114; and that the legislature may, if consistent with the state constitution, confer upon an administrative board the power to determine whether an applicant possesses the qualifications which the legislature has declared to be necessary. The contention is that the statute purports to confer upon the board arbitrary power to exclude applicants from the practice of dentistry and thus violates the due process clause of the Fourteenth Amendment. The District Court held the act void on that ground; and issued a permanent injunction. 274 Fed. 672. Whether it erred in so holding is the only question presented for our consideration on this appeal.

The argument is that, since the act does not state in terms what the scope and character of the examination shall be, arbitrary power is conferred upon the board to grant or withhold licenses. It is pointed out that the statute does not in terms direct that the examination shall relate to the applicant's qualifications to practice dentistry; that it does not prescribe the subjects upon which applicants shall be examined, or whether profi-

ciency shall be determined by knowledge of theory or by requiring applicants to demonstrate skill with the tools and materials of the profession; that it does not provide whether the examination shall be oral or written, or what percentages of correct answers shall be required to pass the examination; and that it does not require the keeping of records of the proceedings which could be used for purposes of review.

What authority the statute purports to confer upon the board is a question of construction. If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment. Its construction is a question of state law. Since the case is here on appeal from a federal court, we must consider it, *Davis* v. *Wallace*, 257 U. S. 478. But in passing upon such questions we follow applicable decisions of the highest court of the State. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 154. The statutory provisions involved in the present case were construed twenty years ago by the Supreme Court of Washington in *In re Thompson*, 36 Wash. 377, 379. It was insisted there that the grant of the power to hold examinations was a delegation of arbitrary legislative power to the dental examiners. The court assumed that to delegate power to make such rules was consistent with the constitution of the State; and that the statute had conferred upon the board power to make rules. It declared that the board must have adopted rules "in order to properly determine the good character of the applicant and the good standing of the college issuing his diploma, and to conduct the examinations upon subjects reasonably required in that profession." And it held that, if there was an abuse of authority, the remedy is to review, by some appropriate proceeding, the conduct of the board,

not to attack the validity of the act. Thus, the highest court of the State has construed this statute as not conferring arbitrary power upon the board in respect to the scope and character of the examination. The statute has been in force for thirty years. The correctness of the views expressed in *In re Thompson* does not appear to have been questioned by that court since. Under such circumstances, we should, even in the absence of controlling decision, decline to give the statute a construction which would render it void, unless compelled to do so by unequivocal language in the act. *Knights Templars' & Masons' Life Indemnity Co.* v. *Jarman,* 187 U. S. 197, 205. Obviously there is none of that character.

The statute provides that the examination shall be before a board of practicing dentists; that the applicant must be a graduate of a reputable dental school; and that he must be of good moral character. Thus, the general standard of fitness and the character and scope of the examination are clearly indicated. Whether the applicant possesses the qualifications inherent in that standard is a question of fact. Compare *Red "C" Oil Mfg. Co.* v. *North Carolina,* 222 U. S. 380, 394. The decision of that fact involves ordinarily the determination of two subsidiary questions of fact. The first, what the knowledge and skill is which fits one to practice the profession. The second, whether the applicant possesses that knowledge and skill. The latter finding is necessarily an individual one. The former is ordinarily one of general application. Hence, it can be embodied in rules. The legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law. When it does so, the function of the examining board is limited to determining whether the applicant complies with the requirements so declared. But the legislature need not make this general finding. To determine the subjects of which one must have knowledge in order to be fit to prac-

tice dentistry; the extent of knowledge in each subject; the degree of skill requisite; and the procedure to be followed in conducting the examination; these are matters appropriately committed to an administrative board. *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, 245–6. And a legislature may, consistently with the Federal Constitution, delegate to such board the function of determining these things, as well as the functions of determining whether the applicant complies with the detailed standard of fitness. *Reetz* v. *Michigan*, 188 U. S. 505. That the scope of the discretion here granted to the examining board was well within the limits allowed by the Federal Constitution, and that it is not to be presumed that powers conferred upon the administrative boards will be exercised arbitrarily, is settled by *Lieberman* v. *Van de Carr*, 199 U. S. 552.

Appellee relied upon *Yick Wo* v. *Hopkins*, 118 U. S. 356. There the licensing board habitually exercised its power arbitrarily, and discrimination was practiced. *Seattle* v. *Gibson*, 96 Wash. 425, and *State ex rel. Makris* v. *Superior Court for Pierce County*, 113 Wash. 296, strongly relied upon by appellee, are not inconsistent with *In re Thompson*. The ordinances involved in these later cases were construed by the state court to vest in the city officials an arbitrary discretion to grant or withhold, and to revoke, licenses. Whether the constitution of the State permits delegation to the examining board of the power to ascertain and fix the essentials of fitness is wholly a state question. *Welch* v. *Swasey*, 214 U. S. 91, 104; *Bradley* v. *Richmond*, 227 U. S. 477, 482. It is not contended that the statute violates the state constitution in this respect.

Reversed.